No. 98-5410-CSY Title: William D. Elledge, Petitioner
v.
CAPITAL CASE Florida

Docketed: Court: Supreme Court of Florida
July 27, 1998

Entry	Date	Proceedings and Orders
	May 19 1998	Application (A97-870) to extend the time to file a petition for a writ of certiorari from June 3, 1998 to August 2, 1998, submitted to Justice Kennedy.
	May 19 1998	Application (A97-870) granted by Justice Kennedy extending the time to file until July 23, 1998.
	Jul 23 1998	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 26, 1998)
	Aug 26 1998	Brief of respondent Florida in opposition filed.
	Sep 10 1998	DISTRIBUTED. September 28, 1998
	Sep 24 1998	Reply brief of petitioner William D. Elledge filed.
	Oct 5 1998	REDISTRIBUTED. October 9, 1998
	Oct 13 1998	Petition DENIED. Dissenting opinion by Justice Breyer. (Detached opinion.)

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98-5410

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

Case No.:

WILLIAM D. ELLEDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

RICHARD B. GREENE *
Assistant Public Defender
Capital Crimes Division

*Counsel of record

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the extraordinary delay in carrying out the death sentence in this case violates the prohibition on Cruel and Unusual Punishments in the Eighth Amendment to the United States Constitution?

2. Whether the Florida Supreme Court's conclusory holding that the trial court's affirmative reliance on false information is harmless error violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution?

3. Whether Florida's felony murder aggravating circumstance genuinely narrows the class of persons eligible for the death penalty as required by the Fifth, Eighth, and Fourteenth amendments to the United States Constitution?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

Case No.:

WILLIAM D. ELLEDGE, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

Petitioner, WILLIAM D. ELLEDGE, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida, which affirmed his conviction and sentence for first degree murder.

CITATION TO OPINION BELOW

The decision of the Supreme Court of Florida, Elledge v. State, 706 So. 2d 1340 (Fla. 1997), is set out in the Appendix to this petition.

JURISDICTION

The original opinion of the Supreme Court of Florida was entered on September 18, 1997. Mr. Elledge filed a timely motion for rehearing. The Florida Supreme Court modified its opinion on rehearing on March 5, 1998. Elledge v. State, 706 So. 2d 1340 (Fla. 1997). Appendix. (The majority opinion was not modified. However, the

dissent was modified.) On May 19, 1998, Justice Kennedy extended the time to file this petition to July 23, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257, Mr. Elledge having asserted in the state court below and asserting in this Court that the State of Florida has deprived him of rights secured by the Constitution of the United States.

PROVISIONS OF LAW

The Fifth Amendment provides in pertinent part:

> No persons shall ... be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section One of the Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Section 782.04(1), Florida Statutes (1973), provides:

782.04(1) Murder. --

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed

by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

(b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.

Section 921.141, Florida Statutes (1973), which governed the capital sentencing proceedings at bar, provides:

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. --

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY. -- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY. -- After hearing all the evidence, the jury shall deliberate and render an

advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. -- Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is bases as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE. -- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES. -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or any flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES. -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

STATEMENT OF THE CASE

Mr. Elledge pled guilty to first degree murder and rape on March 17, 1975 R3095-3113. He was sentenced to death on March 27, 1975. Elledge v. State, 346 So. 2d 998, 999 (Fla. 1977). That sentence was vacated on appeal. Elledge v. State, 346 So. 2d 998 (Fla. 1977). Mr. Elledge was resentenced to death; the Florida Supreme Court affirmed. Elledge v. State, 408 So. 2d 1021 (Fla. 1982). The Eleventh Circuit Court of Appeals reversed for resentencing. Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified 833 F.2d 250 (1987). Mr. Elledge was resentenced to death. The Florida Supreme Court reversed. Elledge v. State, 613 So. 2d 434 (Fla. 1993).

Prior to the current penalty phase, Mr. Elledge filed a motion to preclude the death penalty as the delay in carrying out the sentence violated the Florida and United States Constitutions R3137-43. The motion pointed out that Mr. Elledge had been sentenced to death in March, 1975, and that his case had been reversed three times previously for resentencing. It also pointed out the torturous effects of lengthy stays on death row and the decisions around the world condemning these lengthy ordeals. Oral argument was held on the motion SR73-83. The

trial court denied the motion R3147. Mr. Elledge raised the issue in his direct appeal and the Florida Supreme Court rejected it IB62-65, 706 So. 2d 1340, 1342, 1347.

Mr. Elledge also filed a motion to declare Florida Statute 921.141(5)(d)(the during a felony aggravator) unconstitutional as it failed to genuinely narrow the class of persons who are eligible for the death penalty R3145-52. The jury was instructed on this aggravating circumstance and the trial judge found the aggravator R2864-5,3749-57. Mr. Elledge raised the issue on direct appeal and the Florida Supreme Court rejected the issue IB91-93, 706 So. 2d 1340, 1342, 1347.

Mr. Elledge raised an issue on direct appeal concerning the trial judge's reliance on false information in sentencing Mr. Elledge to death IB77-78. All members of the Florida Supreme Court agreed that the trial judge had relied on false information in sentencing Mr. Elledge to death. Appendix. However, four members of the Florida Supreme Court considered this to be harmless error. Appendix. Justices Anstead and Shaw dissented and would hold the error to be harmful. Appendix. Mr. Elledge filed a motion for rehearing, pointing out how the majority's analysis was contrary to the decisions of this Honorable Court. Appendix. A modified opinion was issued on rehearing. 706 So. 2d 1340. (The majority opinion was not changed. However, the dissent was modified.) Appendix.

REASONS FOR GRANTING THE WRIT

I. THE EXTRAORDINARY DELAY IN CARRYING OUT THE DEATH SENTENCE IN THIS CASE VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is undisputed that Mr. Elledge was sentenced to death in March, 1975. He has now spent twenty three (23) years on death row. The delay has been due to his successful attacks on his sentence on direct appeal to the Florida Supreme Court on two occasions and in the Eleventh Circuit Court of Appeals on one occasion. These reversals were caused by denials of his rights under state law and/or the United States Constitution. This delay constitutes cruel and unusual punishment in violation of the Eighth Amendment.

In Lackey v. Texas, 514 U.S. 1045, 115 S.Ct. 1421 (1995), Justices Stevens and Breyer wrote concerning the importance of a similar issue. Justice Stevens stated:

> Petitioner raises the question of whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendments's prohibition against cruel and unusual punishment. Though the importance and novelty of the question presented by this certiorari petition are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts. See e.g. McCray v. New York, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d (1983) (STEVENS, J., respecting denial of certiorari).
>
> Though novel, petitioner's claim is not without foundation. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, see id., at 177, 96 S.Ct. at 2927 (opinion of Stewart, Powell, and STEVENS, JJ.), and (2) the death penalty might serve "two principal

> social purposes: retribution and deterrence," id. at 183, 96 S.Ct., at 2929-2930.
>
> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the accepted state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." In re Medley, 134 U.S. 160, 172, 10 S.Ct. 384, 388, 33 L.Ed. 835 (1890). If the Court accurately described the effect of uncertainty in Medley, which involved a period of four weeks, see ibid., that description should apply with even greater force in the case of delays that last for many years.* Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal. See, e.g., Coleman v. Balkcom, 451 U.S. 949, 952, 101 S.Ct. 2031, 2033, 68 L.Ed.2d 334 (1981) (STEVENS, J., respecting denial of certiorari) ("the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself"). As Justice White noted, when the death penalty "ceases realistically to further these purposes, ... its imposition would then be pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." Furman v. Georgia, 408 U.S. 238, 312, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (1972) (opinion concurring in judgment); see also Gregg v. Georgia, 428 U.S. at 183, 96 S.Ct., 2929 ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").
>
> Petitioner's argument draws further strength from conclusions by English jurists that "execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689." Riley v. Attorney General of Jamaica,

[1983] 1 A.C. 719, 734, 3 All E.R. 469, 478 (P.C. 1983) (Lord Scarman, dissenting, joined by Lord Brightman). As we have previously recognized, that section is undoubtedly the precursor of our own Eighth Amendment. See, e.g., Gregg v. Georgia, 428 U.S., at 169-170, 96 S.Ct., at 2922; Harmelin v. Michigan, 601 U.S. 957, 966 111 S.Ct. 2680, 2686, 115 L.Ed.2d 836 (1991) (SCALIA, J., concurring in judgment).

Finally, as petitioner notes, the highest courts in other countries have found arguments such as petitioner's to be persuasive. See Pratt v. Attorney General of Jamaica, [1994] 2 A.C. 1, 4 All E.R. 769 (P.C. 1993) (en banc); id., at 32-33, 4 All E.R., at 785-786 (collecting cases).

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* See also People v. Anderson, 6 Cal.3d 628, 649, 100 Cal.Rptr. 152, 166, 493 P.2d 880, 894 (1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture") (footnote omitted); Furman v. Georgia, 408 U.S. 238, 288-289, 92 S.Ct. 2726, 2751-2752, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring) ("[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); Solesbee v. Balkcom, 339 U.S. 9, 14, 70 S.Ct. 457, 94 L.Ed.2d 604 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"); Suffolk County District Attorney v. Watson, 381 Mass. 648, 672, 411 N.E.2d 1274, 1287 (1980) (Braucher, J., concurring) (death penalty is unconstitutional under state constitution in part because "[i]t will be carried out only after agonizing months and years of uncertainty"); id., at 675-686, 411 N.E.2d, at 1289-1295 (Liacos, J., concurring).

115 S.Ct. 1421-1422.

Contrary to the hope of Justice Stevens the lower federal courts have not served as a laboratory to further study this issue. 115 S.Ct. at 1422. Over the strenuous dissents of several judges the lower courts have generally refused to consider this issue on the merits based on abuse of the writ or on the subsequent successor provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter as AEDPA) rather than to grapple with the issue on its merits. McKenzie v. Day, 57 F.3d 1461 (9th Cir. 1995) superseded en banc as McKenzie v. Day, 57 F.3d 1493 (9th Cir. 1995); Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998). In the panel opinion in McKenzie, Judge Norris dissented as to the majority's failure to consider the issue on its merits. 57 F.3d at 1470-1489. Judge Norris also described the "substantial" and "important" nature of this issue.

The most recent decision comes from the Privy Council of the British House of Lords, the highest court in England and the most authoritative interpreter of British common law. Pratt & Morgan v. Attorney General of Jamaica, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993) (en banc). American Courts have long been guided by the decisions of the Privy Council. Sitting en banc for the first time in fifty years, the Privy Council unanimously held that to execute two inmates who had been on death row for fourteen years and who had been read execution warrants on three occasions would constitute "torture or ... inhuman or degrading punishment" in violation of section 17(1) of the Jamaican Constitution, a document rooted in the English common law tradition. Slip op. at 13, 20. The Privy Council explained:

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman to keep a man facing the agony of execution over a long extended period of time.

Id. at 16. The Privy Council commuted the sentences of the two men to life imprisonment.

Though the decision did not involve an interpretation of the cruel and unusual punishment clause of the English Bill of Rights of 1689 -- the source of the Eighth Amendment of the U.S. Constitution -- McKenzie notes that the Privy Council did survey English common law and conclude that extended imprisonment on death row and the repeated setting of execution dates were not practices condoned historically at common law. He further argues that such a conclusion strongly suggests that the cruel and unusual punishment clause of the 1689 Bill of Rights, and in turn the cruel and unusual punishment clause of our Eighth Amendment, would prohibit the execution of an inmate who had been under a sentence of death for a protracted period of time.

McKenzie also highlights another aspect of the Privy Council's decision -- the assignation of fault for the delay of execution:

> [A] State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system and not to the prisoner who takes advantage of it.

Id. at 20.

The second of the foreign decisions relied on by McKenzie also comes from a court following the English common law tradition. In Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General, No. S.C. 73 (Zimb. June 24, 1993) (reported in 14 Hum.Rts.L.J. 323 (1993)), the Supreme Court of Zimbabwe held that prolonged death row incarceration constituted "inhuman or degrading punishment" in violation of its constitution, and thus forbade the execution of four prisoners confined under death sentence for between 4½ to 6 years. Slip op. 9, 45-46. In reaching its decision, the Court considered such factors as the "physical

conditions endured daily" on death row and the "mental anguish" of the condemned prisoners. Id. at 4-5.

Finally, McKenzie cites a decision by the European Commission on Human Rights to block the extradition from Europe to the United States of a man charged with capital murder in the State of Virginia. Soering v. United Kingdom, 11 Eur.Hum.Rts.Rep. 439 (1989). The Commission held that the protracted delays in carrying out death sentences in Virginia, which it averaged 6-8 years, constituted inhuman and degrading punishment in violation of Article 3 of the European Human Rights Convention Charter, a provision that "enshrines one of the fundamental values of the democratic societies making up the Council of Europe." Slip op. at 26. The Commission based its decision in part on "the very long period of time spent on death row in such extreme conditions with the ever present and mounting anguish of awaiting execution of the death penalty...." Id. at 35.

In sum, it is simply beyond the dispute that McKenzie's Eighth Amendment claim is substantial, important, and deserving of careful and thoughtful adjudication.

57 F.3d at 1487-1488 (opinion of Judge Norris, dissenting) (footnote omitted).

Judges Browning, Thompson, and Hawkins dissented from the en banc opinion and urged the court to resolve this issue on the merits. 57 F.3d at 1494-95.

In Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998), the majority of the court refused to rule on this issue on the merits due to the successor provisions of the AEDPA. Judge Fletcher dissented as to the majority's failure to rule on the issue on the merits. Judge Fletcher also described the substantial nature of the issue.

> I respectfully dissent from the majority's summary refusal to grant a stay of execution and address Jose Ceja's claim that to execute him now, after 23 years of incarceration, would violate the Eighth amendments's prohibition against infliction of cruel and unusual punishment. Accordingly, I would grant a certificate of appealability, see 28 U.S.C.

§ 2253(c)(1) (West 1997), and address the merits of his claims.

I speak first to the circumstances of the man whose claims the majority declines to review. Ceja has been incarcerated on death row since December 19, 1974 -- twenty-three (23) years. He has spent more time on death row than any other inmate in Arizona, possibly more than any other inmate in the United States. Ceja has spent more than half of his life on death row, entering at the age of 19. He is now 42. At the start, he was an irresponsible, street-tough teenager without a high school degree. He is now a middle-aged man with a GED and several college courses to his credit who has held employment as a porter on death row and as a law clerk in the law library at the prison.

For twenty-three years, Ceja has suffered the anxiety of impending death and the greatly restricted activity allowed death row inmates. During that time, Ceja has had an execution date set at least five times: February 8, 1978; September 24, 1980; May 11, 1983; December 19, 1984; and January 21, 1998. For 23 years, Ceja has lived in solitary confinement, much of it in the typical death row cell on Cell Block 6 at Arizona State Prison in Florence. Those cells are little more than a 7' x 10' windowless concrete box with a metal sink and toilet and a concrete slab for a bed. Activity outside that cell is typically limited to 3 one-to-two hour periods of week in which the inmate may shower or exercise. Visitations and phone privileges are much more limited than those for the general prison population. Many of a death row inmate's neighbors are deeply disturbed men responsible for some of the most notorious murders in Arizona.

> If Ceja is executed, his de facto sentence will be 23 years of solitary confinement in the most horrible portion of the prison -- death row -- followed by execution. There has never been such a sentence imposed in this country -- or any other, to my knowledge. Neither Arizona nor any other state would ever enact a law calling for such a punishment.
>
> 134 F.3d at 1369 (opinion of Judge Fletcher, dissenting) (footnote omitted).

The issue at bar remains a substantial unresolved issue as Justices Stevens and Breyer pointed out in Lackey three years ago. The

lower federal courts have not served as the laboratory that Justice Stevens had hoped for. Instead, they have generally refused to consider the merits of this issue based on the doctrine of abuse of the writ or on the successor provisions of the AEDPA. This Court should now take this issue and resolve it. The present case is an excellent case in which to resolve this issue. Mr. Elledge has been on death row for twenty three (23) years. This is six years longer than Mr. Lackey had been. The length of time which he has been on death row is due to his successfully overturning his sentence on three occasions due to violations of state law and/or the United States Constitution which were deemed to be harmful error. Twice the Florida Supreme Court reversed on direct appeal. Once the Eleventh Circuit Court of Appeals reversed. Thus, the delay has not been attributable to Mr. Elledge. This case presents no procedural obstacles to ruling on the merits. The claim was clearly raised in the trial court and on direct appeal. The case is on a petition for a writ of certiorari after direct appeal. Thus, none of the jurisdictional limits involved in habeas corpus are present. This is an ideal case in which to resolve this issue.

The torturous effects of the "death row phenomenon" -- that is, the psychologically devastating effects of a lengthy stay on death row -- have been widely noted by jurists during the last three decades. See, e.g., Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in the denial of certiorari) (recognizing that the mental pain suffered by a condemned prisoner awaiting execution "is [a] significant form of punishment" that "may well be comparable to the consequences of the ultimate step itself [i.e., the actual execution]"); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J.,

dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."); Furman v. Georgia, 408 U.S. 238, 288-89 (1972) (Brennan, J., concurring) ("[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."); People v. Anderson, 493 P.2d 880, 894, 6 Cal.3d 628, 649 (Cal. 1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the [protracted] process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."); Suffolk County District Attorney v. Watson, 411 N.E.2d 1274, 1289-95 & nn. (Mass. 1980) (Liacos, J., concurring) (vivid and detailed description of the type of psychological pain and torture that a condemned person experiences while awaiting execution); id. at 1287 (Braucher, J., concurring) (arguing that capital punishment is unconstitutional under Massachusetts Constitution in part because it "will be carried out only after agonizing months and years of uncertainty"); Commonwealth v. O'Neal, 339 N.E.2d 676, 680-81 (Mass. 1975) (Tauro, C.J., concurring) ("The convicted felon suffers extreme anguish in anticipation of the extinction of his existence."); State v. Richmond, 886 P.2d 1329 (Ariz. 1994); Hopkinson v. State, 632 P.2d 79, 209-11 (Wyo. 1981) (Rose, C.J., dissenting in part) (recogniz-

ing "the dehumanizing effects of long imprisonment pending execution"); State v. Ross, 646 A.2d 1318, 1379 (Conn. 1984) (Berdon, J., dissenting) (same); Soering v. United Kingdom, 11 Eur.Hum.Rts.Rep. 439 (1989) (European Court of Human Rights refused to extradite a German national from UK to Virginia to face capital murder charges because of anticipated time that he would have to spend on death row if sentenced to death); Vatheeswaran v. State of Tamil Nadu, 2 S.C.R. 348, 353 (India 1983) (criticizing the "dehumanizing character of the delay" in carrying out an execution); Sher Singh et al. v. The State of Punjab, 2 S.C.R. 582 (India 1983) ("Prolonged delay in the execution of death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed."); Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimb. June 24, 1993) (reported in 14 Hum.Rts.L.J. 323 (1993)).

Similar views have been expressed by legal commentators and mental health experts. See e.g., Schabas, Execution Delayed, Execution Denied, 5 Crim. L. Forum 180 (1994); Lambrix, The Isolation of Death Row in Facing The Death Penalty 198 (M. Radelet ed. 1989); Millemann, Capital Post-Conviction Prisoners' Right to Counsel, 48 Md. L. Rev. 455, 499-500 (1989) ("There is little doubt that the consciousness of impending death can be immobilizing.... This opinion has been widely shared by [jurists], prison wardens, psychiatrists and psychologists, and writers.") (citing authorities); Mello, Facing Death Alone, 37 Amer. L. Rev. 513, 552 & n.251 (1988) (same) (citing studies); Wood, Competency for Execution: Problems in Law and Psychiatry, 14 Fla. St. U. L. Rev. 35, 37-39 (1986) ("The physical and psychological pressure besetting capital inmates has been widely noted.... Courts and

commentators have argued that the extreme psychological stress accompanying death row confinement is an eighth amendment violation in itself or is an element making the death penalty cruel and unusual punishment.") (citing authorities); Stafer, Symposium on Death Penalty Issues: Volunteering for Execution, 74 J. Crim. L. 860, 861 & n.10 (1983) (citing studies); Holland, Death Row Conditions: Progression Towards Constitutional Protections, 129 Akron L. Rev. 293 (1985); Johnson, Under Sentence of Death: The Psychology of Death Row Confinement, 5 Law & Psychology Review 141, 157-60 (1979); Hussain & Tozman, Psychiatry on Death Row, 39 J. Clinical Psychiatry 183 (1979); West, Psychiatric Reflections on the Death Penalty, 45 Amer. J. Orthopsychiatry 689, 694-95 (1979); Gallemore & Parton, Inmate Responses to Lengthy Death Row Confinement, 129 Amer. J. Psychiatry 167 (1972); Bluestone & McGahee, Reaction to Extreme Stress: Impending Death by Execution, 119 Amer. J. Psychiatry 393 (1962); Note, Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment, 57 Iowa L. Rev. 814, 830 (1972); G. Gottlieb, Testing The Death Penalty, 34 S. Cal. L. Rev. 268, 272 & n.15 (1961); A. Camus, Reflections on the Guillotine in Resistance, Rebellion & Death 205 (1966) ("As a general rule, a man is undone waiting for capital punishment well before he dies."); F. Dostoyevsky, The Idiot, 47-48 (D. Magarshack trans. 1955); Duffy & Hirshberg, Eighty-Eight Men and Two Women 254 (1962) ("One night on death row is too long, and the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.") (quoting former warden of California's San Quentin Prison).

In addition to the above-cited authorities, Mr. Elledge's Eighth Amendment arguments are strongly supported by a recent landmark decision in a capital appeal rendered by the Judicial Committee of the Privy Council of the United Kingdom (the "Privy Council").[1] See Pratt & Morgan v. The Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993, 3 WLR 995, 143 NLJ 1639, 2 AC 1, 4 All ER 769 (Nov. 2. 1993) (en banc).

In Pratt, an appeal by two condemned men on Jamaica's death row, the Privy Council, sitting en banc for the first time in five decades, unanimously held that carrying out the death sentences of the two men would be "torture," and "inhuman" and "degrading" punishment. The Privy Council did not hold that capital punishment was cruel and unusual per se, but instead focused on the fact that the condemned men had been on death row for a protracted period of time (fourteen years).

The rationale of the case was summarized in the opening paragraph:

> The appellants ... were arrested 16 years ago for murder.... On 15th January 1979 they were convicted of murder and sentenced to death.... On three occasions the death warrant has been read to [Pratt and Morgan] and they have been removed to the condemned cells immediately adjacent to the gallows.... The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows.

Slip op., at 1 (emphasis added).

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[1] The Privy Council is the highest appellate court for Commonwealth nations. The jurists who sit on the Privy Council are likewise members of England's highest domestic appellate court, the House of Lords ("the Law Lords").

Pratt & Morgan also surveyed the history of English common law regarding the subject of lengthy imprisonment for a condemned man on death row. The Privy Council concluded that this practice was not condoned at common law. See, e.g., id. at 2-3 ("It is difficult to envisage any circumstance in which in England a condemned man would have been kept in prison for years awaiting execution."); id. at 5 (noting the "common law practice that execution followed as swiftly as practical after sentence"); see also Riley v. Attorney General of Jamaica, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman) ("[T]here is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in Section 10 of the Bill of Rights of 1689...."), majority opinion overruled by Pratt & Morgan v. Attorney General of Jamaica, 2 AC 1, 4 All ER 769, 3 WLR 557 (Privy Council 1993) (en banc).[2]

Pratt & Morgan along with U.S. and international authorities discussed herein, offers a firm legal basis for Mr. Elledge's Eighth Amendment claim.[3]

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[2] As Justice Scalia has recognized, "[t]here is no doubt" that Section 10 of the English Bill of Rights of 1689 "is the antecedent" of the cruel-and-unusual punishment clause of our Eighth Amendment. See Harmelin v. Michigan, 501 U.S. 957, 966 (1991) (opinion of Scalia, J.).

[3] Literally hundreds of American courts and jurists have been guided by the decisions of the Privy Council, the highest expositor of law in our Mother Country, whose common law has greatly shaped our own law. See e.g., United States v. Raddatz, 447 U.S. 667, 679 (1980) (citing a Privy Council decision with approval); Kilbourn v. Thompson, 103 U.S. 168, 186 (1881) (same); see also Fisher v. United States, 328 U.S. 463, 488 (1946) (Frankfurter, J., dissenting) ("This Court in reviewing a conviction for murder ... ought not be behind ... the Privy

This Court has interpreted the reach of the Amendment in a "flexible and dynamic manner." Gregg v. Georgia, 428 U.S. 153, 171 (1976); see also Weems v. United States, 217 U.S. 349, 373 (1910) ("a principle, to be vital, must be capable of wider application than the mischief which gave it birth"). The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). As the concepts of dignity and civility evolve, so too do the limits of what is considered cruel and unusual. Such factors include international practices. See e.g., Stanford v. Kentucky, 492 U.S. 361, 369 (1989); Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 458 U.S. 782 (1982).

The weight of international authority -- including a recent unanimous decision by the highest court in our Mother Country -- strongly supports Mr. Elledge's contention that his execution would violate the Eighth Amendment.

Other well-established Eighth Amendment principles of broad application are relevant to this Court's analysis. The Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity and decency'" against which forms of punishment must be measured. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citation omitted). It "expresses the revulsion of civilized man against barbarous acts -- the 'cry of horror' against man's inhumanity to his fellow man." Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring).

Counsel....") (discussing Privy Council decisions).

The Eighth Amendment's restrictions on the ability of a state to impose certain types of punishment "aim to protect the condemned from fear and pain ... or to protect the dignity of society itself from the barbarity of exacting mindless vengeance." Ford v. Wainwright, 477 U.S. 399, 410 (1986). At its core, the Eighth Amendment stands to safeguard "nothing less than the dignity of man." Trop v. Dulles, 356 U.S. 86, 100 (1958). It cannot be gainsaid that keeping a condemned man on death row for twenty-three years impugns fundamental human dignity.

As a result of the abhorrent conditions to which he has been subjected during the last 23 years, William Elledge has endured a needlessly lingering form of torturous psychological punishment that, if the State has its way, will culminate in electrocution. See Gregg v. Georgia, 428 U.S. 153, 170-71 (1976) (unnecessarily lingering form of execution is unconstitutional under the Eighth Amendment) (citing In re Kemmler, 136 U.S. 436, 447 (1890)).

Finally, the fact that Petitioner is challenging the lingering psychological anguish resulting from his excessively lengthy stay on death row -- and is not alleging physical torture -- does not foreclose an Eighth Amendment claim.[4] It is well-established that the infliction of extreme mental anguish can be a form of unconstitutional torture.

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[4] In Pratt & Morgan, the British Privy Council focused exclusively on the mental torture inflicted on two condemned men on Jamaica's death row. See Pratt & Morgan, slip op., at 1-2 (describing "the agony of mind that these men must have suffered as they alternated between hope and despair in the 14 years that they have been in prison facing the gallows. It is unnecessary to refer to the evidence describing ... the emotional and psychological impact of this experience, for it only reveals that which is to be expected.").

See e.g., Trop v. Dulles, 356 U.S. at 102 (expatriation as penalty for desertion "subjects the individual to a fate of ever increasing fear and distress"); Hudson v. McMillan, 112 U.S. 1, 16 (1992) (Blackmun, J., concurring) ("I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes [under the Eighth Amendment]. If anything, our precedent is to the contrary."); Furman v. Georgia, 408 U.S. 238, 271-72 (1972) (Brennan, J., concurring) ("[T]he Framers also knew [] that there could be exercises of cruelty other than those which inflicted bodily pain or mutilation."); see also Smith v. Aldingers, 999 F.2d 109, 110 n.4 (5th Cir. 1993) (collecting recent cases holding that mental or psychological torture can violate the Eighth Amendment); Cf. In re Medley, 134 U.S. 160, 171 (1890) (recognizing the "immense mental anxiety" that a condemned man experiences when the authorities intentionally refuse to inform him of the precise date of his execution, and referring to it as "one of the most horrible feelings to which he can be subjected") (emphasis added).

Therefore, to permit the State to carry out an execution after requiring William Elledge to endure such torturous conditions for twenty-three years would unquestionably violate the Eighth Amendment. This Court should grant the petition for writ of certiorari to decide this important issue.

II. THE FLORIDA SUPREME COURT'S CONCLUSORY STATEMENT THAT THE TRIAL COURT'S AFFIRMATIVE RELIANCE ON FALSE INFORMATION IS HARMLESS ERROR VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Florida Supreme Court unanimously found that the trial judge relied on false information in rejecting a statutory mitigating

circumstance. However, by a four to two vote it found that this error was harmless. Appendix. Mr. Elledge challenged the majority's finding of harmlessness on rehearing. Appendix. The revised opinion on rehearing did not change this portion of the majority opinion. Elledge v. State, 706 So. 2d 1340, 1346-7 (Fla. 1997). The analysis of the majority of the Florida Supreme Court consisted of a conclusory statement that the error was harmless. It is also based on a selective quoting of the trial judge's order. This violates the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The majority recognized that the trial judge misstated Dr. Caddy's view regarding the statutory mental mitigating circumstance of "extreme mental or emotional disturbance." However, it held that this was harmless error. Justices Anstead and Shaw would hold that this is harmful error.

The majority analyzed the issue as follows:

> Elledge next asserts that the trial court misstated the testimony of defense expert Dr. Caddy concerning the "extreme mental or emotional disturbance" statutory mitigator:
>
> > The Court finds the applicability of this mitigating circumstance was rebutted by the defendant's own expert. Dr. Caddy testified, based upon his examination of the defendant, interviews with family and friends, and, a review of the facts of this case, that it is his expert opinion that the defendant was not under extreme mental or emotional disturbance when he committed the murder of Margaret Anne Strack.
>
> We agree that the trial court misstated Dr. Caddy's views, which were that the mitigator applied to Elledge, but we find the error harmless in light of the court's reliance on Dr. Stock's conclusions:
>
> > Dr. Stock concluded that the defendant did not suffer from fetal alcohol syndrome and found no indications of any organicity. Also, the defendant did not suffer from any mental illness, impulse control disorder, or post-traumatic stress disorder. Dr. Stock concluded that the defendant had an anti-social personality disorder. Dr. Stock testified that this is not a mental illness, but a life long history of a person who makes bad choices in life and that these choices are conscious and volitional.
> >
> > * * *
> >
> > The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Margaret Anne Strack was committed. As such, the court finds that this mitigating circumstance does not apply.
>
> On this record, we conclude beyond a reasonable doubt that the trial court's misstatement of Dr. Caddy's views did not affect the outcome. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

706 So. 2d at 1346-47.

This Court has long held that an appellate court can only affirm after finding a constitutional error if it is "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). More recently this Court has clarified that the verdict (or sentence) must be "surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). This Court has held that in capital sentencing errors an appellate court may either reweigh the permissible aggravating and mitigating evidence or perform a traditional harmless error analysis. Clemons v. Mississippi, 494 U.S. 738 (1990). This Court has reversed the Florida Supreme Court on two occasions in recent years for constitutionally deficient harmless error analysis concerning capital sentencing errors. Parker v. Dugger, 498 U.S. 308 (1991); Sochor v. Florida, 504 U.S. 527 (1992). (This Court correctly noted

in both of these cases that the Florida Supreme Court does not reweigh; it performs traditional harmless error analysis. That is what it purported to do in this case also.)

The majority selectively quotes from the trial judge's order in order to make it appear that the trial judge relied on Dr. Stock for his ultimate conclusion on this mitigator. The majority includes the following in its opinion.

> Dr. Stock concluded that the defendant did not suffer from fetal alcohol syndrome and found no indications of any organicity. Also, the defendant did not suffer from any mental illness, impulse control disorder, or post-traumatic stress disorder. Dr. Stock concluded that the defendant had an anti-social personality disorder. Dr. Stock testified that this is not a mental illness, but a life long history of a person who makes bad choices in life and that these choices are conscious and volitional.
>
> * * *
>
> The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Margaret Anne Strack was committed. As such, the court finds that this mitigating circumstance does not apply.

The majority's use of ellipsis makes it appear that the trial judge concluded his analysis on this mitigating circumstance with a discussion of Dr. Stock's testimony. In fact, he concluded his analysis of this mitigating circumstance with his misstatement of Dr. Caddy's testimony. The judge actually concluded his analysis:

> The Court finds the applicability of this mitigating circumstance was rebutted by the defendant's own expert. Dr. Caddy testified, based upon his examination of the defendant, interviews with family and friends, and, a review of the facts of this case, that it is his expert opinion was that the defendant was not under extreme mental or emotional disturbance when he committed the murder of Margaret Anne Strack.
>
> The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Margaret Anne Strack was committed. As such, the court finds that this mitigating circumstance does not apply.

R3759-3760.

The structure of the trial judge's order supports the conclusion that the error is harmful. The judge concludes his analysis of this mitigating circumstance with his misstatement that this mitigating circumstance "was rebutted by the defendant's own expert" R3759. The selective quotation and use of ellipses distorts this.

There is no principled way to know beyond a reasonable doubt that this error is harmless. The trial judge thought that two out of three experts, including a defense expert, had testified that this mitigating circumstance did not apply. However, the truth was that two out of three experts had testified that the circumstance did apply and only the State's doctor had testified that it did not. This is a very different state of the evidence. The fact that the judge took the trouble to put this statement in his order is a strong indication that he felt it to be significant. There is no way to know beyond a reasonable doubt that the result would have been the same if the judge had correctly understood the evidence.

The use of harmless error in this case is the sort of conclusory statement condemned by this Court. In Clemons, supra, the United States Supreme Court reversed the Mississippi Supreme Court for its "cryptic holding" that an error in capital sentencing was "harmless

beyond a reasonable doubt" without further explanation. In Sochor, supra, Justice O'Connor further explained the dangers of such a conclusory statement.

> I join the Court's opinion but write separately to set forth my understanding that the Court does not hold that an appellate court can fulfill its obligation of meaningful review by simply reciting the formula for harmless error. In Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967), we held that before a federal constitutional error can be held harmless, the reviewing court must find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id., at 24, 87 S.Ct., at 828. This is a justifiably high standard, and while it can be met without uttering the magic words "harmless error," see ante, at 2122-2123, the reverse is not true. An appellate court's bald assertion that an error of constitutional dimensions was "harmless" cannot substitute for a principled explanation of how the court reached that conclusion. In Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), for example, we did not hesitate to remand a case for "a detailed explanation based on the record" when the lower court failed to undertake an explicit analysis supporting its "cryptic," one-sentence conclusion of harmless error. Id., at 753, 110 S.Ct., at 1451. I agree with the Court that the Florida Supreme Court's discussion of the proportionality of petitioner's sentence is not an acceptable substitute for harmless error analysis, see ante, at 2122-2123, and I do not understand the Court to say that the mere addition of the words "harmless error" would have sufficed to satisfy the dictates of Clemons.

504 U.S. at 541 (Opinion of O'Connor, J., concurring).

Here, the Florida Supreme Court relied on the same sort of conclusory statement.

The harmful nature of the error is further supported by the fact that it concerned the application of a statutory mental mitigating circumstance. The Florida Supreme Court has repeatedly stated that the statutory mental mitigating circumstances are among the most signifi-

cant mitigating circumstances in a capital case. Burns v. State, 699 So. 2d 646, 650 (Fla. 1997), Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Deangelo v. State, 616 So. 2d 440 (Fla. 1993); Songer v. State, 544 So. 2d 1010 (Fla. 1989); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). Thus, an error in evaluation of these circumstances is likely to be harmful.

The judge's misconstruction of the testimony in this case is akin to two other capital sentencing errors which this Court has dealt with. (1) The failure to consider mitigating evidence. (2) The reliance on false evidence. The refusal to consider mitigating evidence is virtually always harmful error. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986); Hitchcock v. Dugger, 481 U.S. 393 (1987). If the trial judge had refused to consider Dr. Caddy's testimony concerning this mitigating circumstance, there could be no serious claim of harmless error. Here, the error is actually more prejudicial. The judge misconstrued Dr. Caddy's testimony and used it to reject this mitigating circumstance, when it actually supported it. This affirmative misuse is far more harmful than mere non-consideration. In Johnson v. Mississippi, supra, this Court dealt with the reliance on false evidence in a capital sentencing. This Court specifically rejected reliance on harmless error.

> The error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate.

Johnson, supra, at 590 (footnote omitted).

The Florida Supreme Court relied on the sort of conclusory statement of harmless error condemned by this Court in Clemons and by Justice O'Connor in Sochor. This Court should grant certiorari to consider this issue.

III. FLORIDA'S FELONY MURDER AGGRAVATING CIRCUMSTANCE DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AS REQUIRED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The automatic application of the felony murder aggravating circumstance to a defendant whose first degree murder conviction rests on a felony murder theory fails to genuinely narrow the class of persons eligible for the death penalty under the Eighth Amendment.

The decision of the Florida Supreme Court conflicts with the decisions of three other state supreme courts on this important issue of federal constitutional law. The Wyoming Supreme Court held that the use of a similar aggravating circumstance violated the United States Constitution. Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991). The Tennessee Supreme Court held that the use of a similar aggravator violated the United States and Tennessee Constitutions. State v. Middlebrooks, 840 S.W.2d 317, 341-7 (Tenn. 1992), certiorari granted as Tennessee v. Middlebrooks, 507 U.S. 1028, certiorari dismissed as improvidently granted as Tennessee v. Middlebrooks, 510 U.S. 124 (1993). The North Carolina Supreme Court originally prohibited the use of this aggravator in a felony murder prosecution as a matter of state law. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979). However, the North Carolina Supreme Court subsequently clarified that this prohibition was also based on the United States Constitution. State

v. Brown, 306 N.C. 151, 293 S.E.2d 569, 585-6 (1982). There is a clear split among the states in this important federal issue.

Petitioner is aware that this Court dismissed certiorari as improvidently granted, over the dissent of Justice Blackmun, in Middlebrooks. 510 U.S. 124 (1993). However, in Middlebrooks, the Tennessee Supreme Court explicitly relied on the Tennessee Constitution as an alternative rationale.

> We have determined that in light of the broad definition of felony murder and the duplicating language of the felony murder aggravating circumstance, no narrowing occurs under Tennessee's first-degree murder statute. We hold that, when the defendant is convicted of first-degree murder solely on the basis of felony murder, the aggravating circumstance set out in Tenn. Code Ann. §§ 39-2-203(i)(7) (1982) and 39-13-204(i)(7) (1991), does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution because it duplicates the elements of the offense. As a result, we conclude that Tenn. Code Ann. § 39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution where the death penalty is imposed for felony murder.

840 S.W.2d at 346.

Thus, it is likely that the dismissal of certiorari in Middlebrooks was due to an independent and adequate state law ground, not to the merits of the issue. In the present case there is no independent state law basis. This is an excellent case to take this issue as the underlying felony was essential to support Mr. Elledge's conviction for first degree murder.

The evidence in this case clearly indicates an impulsive reaction to screaming and frustration from sexual teasing R3105-3111. Additionally, there was extensive evidence of intoxication from alcohol

and marijuana R3110. Indeed, the judge's comments in finding a factual basis for first degree murder indicate that he believed that the fact that the homicide was during a rape was essential to making this a first degree murder R3110-3111. It is unconstitutional to use the fact of a rape to make the offense first degree murder and to also use it as an aggravator.

A. Florida's First Degree Murder Statute And The Operation Of Florida's Death Sentencing Scheme

Florida has broadly defined first degree murder to include two separate classes of murderers -- premeditated murderers and felony murderers. Section 782.04(1)(a), Florida Statues (1973).

The broad class of first degree murderers defines the class of murderers who are eligible for the death penalty. A conviction of first degree murder by itself is not meant to expose a defendant to the death penalty. Rather, at a separate sentencing hearing the state is required to prove at least one aggravating circumstance. § 921.141(2) & (3), Florida Statues (1973).

B. The Class Of Persons Eligible For The Death Penalty Is Not "Genuinely Narrowed" By The Felony-Murder Aggravating Circumstance

Florida defines first degree felony murder and the felony murder aggravating circumstance in the same manner. Proof of the felony-murder aggravating circumstance entails proof of the felony-murder. The class of persons eligible for the death penalty is not "genuinely narrowed" in a rational, principled manner through the felony-murder aggravating circumstance.

1. Eighth and Fourteenth Amendments Require "Genuine Narrowing"

To comply with the Eighth Amendment, states must narrow the class of persons eligible for the death penalty. Zant v. Stephens, 462 U.S. 862, 877 (1983). The narrowing must be done in a way that reasonably justifies the imposition of a more severe sentence on the defendant than compared to others found guilty of murder. Id. Thus, this Court has emphasized the dual function of "genuine narrowing":

> To pass constitutional muster, a capital sentencing scheme must *'genuinely narrow'* the class of persons eligible for the death penalty and must *reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.*

Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (emphasis supplied), quoting Zant v. Stephens, 462 U.S. at 877. "Genuine narrowing" serves its Eighth Amendment purpose by reducing the opportunities for arbitrary and capricious imposition of the death penalty in two ways. First, "narrowing" limits the class of murderers eligible for death. the limitation assures that the death penalty cannot be imposed indiscriminately. Second, "genuine narrowing" limits the death penalty to those murderers whose culpability makes the death penalty particularly appropriate. This limitation assures rationality by avoiding arbitrary sentencing. "Genuine narrowing" provides a principled method to distinguish cases in which the death penalty is imposed from those cases in which it was not. Godfrey v. Georgia, 446 U.S. 420, 433 (1980). It must do so in an objective and rational manner. Zant, supra, 462 U.S. at 879. Thus, "genuine narrowing" ensures that those who receive the death penalty will be amongst the worst murderers. See Gregg v. Georgia, 428 U.S. 153 (1976). It would be the height of

arbitrariness if less culpable murderers were included in the class eligible for the death penalty while more culpable murderers were systematically spared. Thus, "genuine narrowing" in a rational manner is required under the Eighth Amendment. Zant, supra.

A state is free to narrow its class of death eligibles through its definition of first degree murder or through the creation of aggravating circumstances. Lowenfield v. Phelps, 484 U.S. 231 (1988).

2. Florida Does Not Genuinely Narrow The Class Of Death Eligibles Through Its Statutory Definition Of First-Degree Murder

Florida has broadly defined the class of death-eligible murderers to include all first-degree murderers. Florida has defined first degree murder extremely broadly to include all premeditated murders as well as all killings that occur in the course of a long list of felonies regardless of the intent of the defendant.

Due to the broad definition of death-eligible murders, it is clear that the Florida system is vastly different from the Louisiana system which defined "first-degree murder to include a narrower class of homicides" thereby limiting death eligibility to highly aggravated, highly culpable murders. Lowenfield, 484 U.S. at 241. Louisiana required proof of both (1) a specific intent to kill or inflict great bodily harm and (2) one of five specific situations which distinguished the murder from other less culpable murders. Id. at 242. Thus, the class of death eligibles was genuinely narrowed by the statutory definition.

In contrast to Louisiana, Florida has a broad definition of first degree murder by not requiring any intent for first-degree felony

murder. Florida's first-degree murder statute is virtually identical to Tennessee's, North Carolina's and Wyoming's, which recognize that the narrowing of death eligibles is not done by statutory definition of first degree murder, but by aggravating circumstances. Middlebrooks, supra; Cherry, supra; Engberg, supra. Florida utilizes the statutory aggravating circumstances to narrow the class of death eligible first-degree murderers.

The Florida Legislature has narrowed the class of death eligibles not by redefining its first-degree murder statute, but by listing a number of aggravating circumstances requiring that at least one of the aggravating circumstances be found beyond a reasonable doubt before the death penalty may be imposed.

3. Florida's Felony Murder Aggravating Circumstance Does Not "Genuinely Narrow" The Class Of Death Eligibles In A Rational Principled Manner

The purpose of aggravating circumstances is to "enable the sentencer to distinguish those who deserve capital punishment from those who do not." Arave v. Creech, 507 U.S. 463, 475 (1993). Florida's felony murder aggravating circumstance does not genuinely distinguish between those who deserve the death penalty from those who do not. Florida's sentencing scheme permits one to be sentenced to death based upon the felony-murder aggravating circumstance which is co-extensive with the felony-murder finding that underlays the first degree murder conviction itself. Thus, the Florida scheme arbitrarily takes one of the two broad classes of murderers and automatically makes it subject to death without requiring any additional elements to justify imposing the death penalty. In Florida the proof of the fact

that the killing occurred during the course of a felony substitutes for proof of premeditation. There is no rational basis for treating felony murderers as a class more harshly than the class of premeditated murderers by making the former but not the latter automatically subject to the death penalty. Such an arbitrary result is prohibited by the Eighth Amendment.

"Punishment should be directly related to the personal culpability of the criminal defendant." Penry v. Lynaugh, 492 U.S. 302 (1989). Thus, one will not be eligible for the death penalty absent proof of additional criteria which make him more culpable or otherwise deserving a more severe sentence. Lowenfield, 484 U.S. at 244. Because there was no genuine narrowing at the definitional stage, and because there were no rational criteria establishing greater culpability was proven by the felony-murder aggravating circumstance at the sentencing stage, Florida's felony-murder sentencing scheme does not rationally justify enhancing punishment for all felony murderers over all premeditated murderers. Florida's sentencing scheme violates the Eighth Amendment.

This Court should grant certiorari on this important constitutional issue in which the state supreme courts are split. It should reverse the decision of the Florida Supreme Court and follow the decisions of the Tennessee, North Carolina, and Wyoming supreme courts.

CONCLUSION

The Court should grant the Writ of Certiorari.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Richard B. Greene
RICHARD B. GREENE *
Assistant Public Defender

* Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Carolyn M. Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 by U.S. Mail this 22nd day of July, 1998.

Richard B. Greene
Of Counsel

APPENDIX A

Original opinion of Florida Supreme Court

Supreme Court of Florida

WILLIAM D. ELLEDGE,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. 83,321

[September 18, 1997]

PER CURIAM.

We have on appeal a trial court order imposing the death sentence upon William D. Elledge following resentencing. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm.

In 1974, Elledge confessed to a weekend of crimes which included the rape and murder of Margaret Anne Strack and the murder and robbery of Edward Gaffney and Kenneth Nelson.[1] Elledge pled guilty to the murder and robbery of both Nelson and Gaffney and to the rape and murder of Strack. He was sentenced to life imprisonment for the Nelson and Gaffney murders, and in March 1975, he was sentenced to death for the murder of Strack.

This Court reversed and remanded his case for resentencing in Elledge v. State, 346 So. 2d 998 (Fla. 1977). On remand, Elledge was again sentenced to death, and that sentence was affirmed by this Court in Elledge v. State, 408 So. 2d 1021 (Fla. 1981). Elledge's subsequent motion for post-conviction relief and a state habeas corpus petition were denied in Elledge v. Graham, 432 So. 2d 35 (Fla. 1983). However, Elledge received federal habeas relief in Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), reh'g granted in part, 833 F.2d 250 (11th Cir. 1987). Elledge's third sentencing proceeding was held in 1989 and he was again sentenced to death. That death sentence was vacated in Elledge v. State, 613 So. 2d 434 (Fla. 1993).

Elledge's fourth sentencing proceeding took place in November 1993 and is the subject of the instant appeal. The jury recommended death by a vote of nine to three. The trial judge found four aggravating circumstances,[2] no statutory mitigating circumstances, and three nonstatutory mitigating circumstances[3] to which he

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[1]The facts are set out fully in Elledge v. State, 346 So. 2d 998, 999 (Fla. 1977).

[2]Aggravating factors: (1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the defendant was engaged in the commission of, attempt to commit, or escape after committing a rape; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the capital felony was especially heinous, atrocious, or cruel.

[3]Non-statutory mitigating factors: (1) the defendant had a difficult and abusive childhood; (2) the defendant demonstrated some cooperation by confessing after he was caught; (3) the defendant was a friend and provider

attributed little weight cumulatively. Finding that the mitigating circumstances were substantially outweighed by the aggravating circumstances, the trial court sentenced Elledge to death. Elledge raises twenty-seven issues in this appeal.[4]

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of support while incarcerated.

[4]Whether the trial court erred by: (1) denying Elledge's motion to withdraw his guilty plea; (2) allowing the state to introduce the details of prior violent felony convictions; (3) allowing testimony concerning prior violent felonies to become a feature of the case; (4) allowing improper cross-examination of Ken Roach; (5) allowing inflammatory evidence of after-death activity; (6) subjecting Elledge to a compelled mental health examination by a prosecution expert; (7) allowing the state to use a compelled mental health evaluation to rebut mitigation not based on a mental health examination; (8) denying defense counsel's request to have his expert view the in-court testimony of the prosecution's mental health expert; (9) sustaining the prosecution's objection to the defense exercise of a peremptory challenge; (10) restricting voir dire; (11) its extraordinary delay in providing a lawful penalty phase; (12) denying Elledge's motion to preclude death based on an unconstitutional delay; (13) giving an improper instruction on reasonable doubt; (14) refusing to instruct the jury on nonstatutory mitigation; (15) failing to explain the nature and function of mitigating circumstances; (16) giving an unconstitutional instruction on the HAC aggravating circumstance; (17) giving undue weight to the jury's death recommendation; (18) applying a presumption of death; (19) failing to consider and/or find the statutory mitigating factor described in section 921.141(6)(c), Florida Statutes, ("The victim was a participant in the defendant's conduct or consented to the act"); (20) basing its order on partially false information; (21) failing to consider and find nonstatutory mitigating circumstances proposed by defense counsel; (22) inaccurately evaluating child abuse as a mitigator, both factually and legally; (23) instructing the jury and finding the avoid arrest aggravator; (24) finding the HAC aggravator and in instructing the jury on this aggravator; and (25) whether the felony murder aggravating circumstance (§ 921.141 (5)(d)) is unconstitutional on its face and as applied in this case; (26) whether electrocution violates the state and federal constitutions; (27) whether Florida's death penalty statute is unconstitutional.

Elledge first argues that the trial court erred by denying his motion to withdraw his 1975 guilty plea in light of Koenig v. State, 597 So. 2d 256 (Fla. 1992).[5] We disagree. Florida Rule of Criminal Procedure 3.170(j) (1973), which governed the taking of guilty pleas in 1975, stated:

> Responsibility of Court on Pleas. No plea of guilty or nolo contendere shall be accepted by a court without first determining, in open court, with means of recording the proceedings stenographically or by mechanical means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty.

The following excerpt is from the plea colloquy which occurred between Elledge and the court in March 1975:

THE COURT: Is the defendant

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[5]In Koenig, we explained the requirements of Florida Rule of Criminal Procedure 3.172(c), governing the taking of pleas in criminal cases:

> The rule specifically provides that a trial judge should, in determining the voluntariness of a plea, inquire into the defendant's understanding of the fact that he is giving up the right to plead not guilty, the right to a trial by jury with the assistance of counsel, the right to compel the attendance of witnesses on his behalf, the right to confront and cross-examine adverse witnesses, and the right to avoid compelled self-incrimination.

597 So. 2d at 258.

going to enter a plea of guilty as to both counts in the Indictment?

MR. McCAIN [DEFENSE COUNSEL]: That's correct.

THE COURT: Will the defendant and his attorney approach the bench, please? Is that what you want to do, Mr. Elledge?

THE DEFENDANT: Yes, sir.

THE COURT: When you plead guilty to a charge, Mr. Elledge, you are admitting the truth of the facts alleged by the State in this Information. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Of course, when you plead not guilty, you deny that.

You do understand that you are entitled to have a trial by jury--

THE DEFENDANT: Yes.

. . . .

THE COURT: Mr. Elledge, under the law, you could be sentenced to a sentence of death in this charge of first degree murder. Do you understand that?

THE DEFENDANT: Yes; I do.

. . . .

[THE COURT:] On Count I, murder in the first degree, Mr. Elledge, the Court doesn't have any choice, if you are sentenced to life instead of death. That is the only two sentences on that offense. So the Court can't put you on probation, or anything lesser than that. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: You are represented by Mr. McCain, who is standing here with you. Have you discussed fully with him your case, and told him everything that you know about it?

THE DEFENDANT: Yes, sir.

THE COURT: Has Mr. McCain discussed with you any defenses that might be available in the case?

THE DEFENDANT: Yes; we have.

THE COURT: Has he given you the benefit of his advice?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied that Mr. McCain has represented you the best he can, and done what could be expected of him?

THE DEFENDANT: Yes; I am.

THE COURT: Is anybody forcing you to plead guilty?

THE DEFENDANT: No.

. . . .

THE COURT: Has anybody promised you anything in any way, that you are going to be rewarded in any fashion, or you are going to get probation or leniency, or a life sentence like if you plead guilty?

THE DEFENDANT: No; they haven't.

. . . .

[THE COURT:] Knowing that you could be sentenced to death for this crime of murder in the first degree, Mr. Elledge, do you still wish to plead guilty? Mr. Elledge, do you still wish to plead guilty?

THE DEFENDANT: Yes; I do.

THE COURT: Knowing you

could be sentenced to life in prison, or any number of years with a minimum of 30 years on the rape in Count II, do you still wish to plead guilty to that?

THE DEFENDANT: Yes.

THE COURT: The Court will make the finding that William Duane Elledge knows what he is doing; that he intelligently, understandingly and advisingly wishes to plead guilty to the charge of murder in the first degree as alleged in Count I of this Indictment; and plead guilty to the charge of rape as alleged in Count II of this Indictment.

The Court, therefore, accepts these pleas and they shall be so entered.

. . . .

[THE COURT:] Accordingly, based upon your plea and the factual testimony presented here, the Court will adjudge you to be guilty of the crime of murder in the first degree as alleged in Count I.

The Court will hereby adjudge you to be guilty of the crime of rape as alleged in Count II.

We conclude that Elledge had "full understanding of the significance of his plea and its voluntariness" as required by rule 3.170(j). See Elledge v. Graham, 432 So. 2d 35, 37 (Fla. 1983)("[T]he appellant's confessions and guilty plea were properly admitted."). We find our decision in Koenig, rendered almost seventeen years after the plea was entered, inapplicable. See Preston v. State, 444 So. 2d 939, 942 (Fla. 1984) ("[R]econsideration [of law of the case] is warranted only in exceptional circumstances and where reliance on the previous decision would result in manifest injustice."). We find no error.

Elledge next asserts that the trial court erred in allowing the state to introduce the details of two prior violent felony convictions (Gaffney and Nelson homicides) because he offered to stipulate to their validity. This issue has been decided adversely to Elledge. Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990); Perri v. State, 441 So. 2d 606, 607-08 (Fla. 1983)("In the sentencing proceeding, testimony about the details of a prior violent felony involving the use or threat of violence to the person is properly admitted."). We likewise find from our review of the record that the the details of the two prior homicides did not become a feature of the case. Thus, we find no error.

Next, Elledge contends that the prosecutor's cross-examination of Ken Roach, the police officer who interrogated him and took his first statement, was beyond the scope of direct examination and was an attempt to elicit improper details of a prior violent felony, the Nelson murder. We disagree. Defense counsel elicited, inter alia, that Roach was an acquaintance of Nelson; that he talked to Mrs. Nelson at the time of the crime; and that Elledge finally confessed to Roach about the Strack, Nelson and Gaffney murders:

> ROACH: And then shortly thereafter during a period of silence [Elledge] just volunteered his confession to me.
>
> DEFENSE COUNSEL: What was that? What was that like, Father?
>
> ROACH: He told me that he had killed the girl in a motel room in Hollywood, Florida. That he had shot the man in the store while he was in the process of trying to find some money. And then he had taken a bus to Jacksonville and paid his way out to Jacksonville Beach and walked out on the beach and found this Beacon Motel. And went in and under the pretense of renting a room and had a gun with him that he had taken from a prior scene, and he got the jump on the people, tied them up and that Mr. Nelson got loose from his bounds and, you know, that he shot him.

Accordingly, we conclude that the trial court did not abuse its discretion by allowing the prosecutor to cross-examine Roach on the facts of Nelson's murder such as the number of shots fired, the type of weapon used and where it was found. Jones v. State, 580 So. 2d 143, 145 (Fla. 1991)("Trial courts have wide latitude to impose reasonable limits on the scope of cross-examination."). We find no error.

We also reject Elledge's claim that the court erred by allowing evidence of after-death activity. In his taped statement, Elledge described activities such as putting the top half of Strack's body over the edge of the bathtub and washing the blood from her nose; grabbing hold of her feet, throwing her out the back door and rolling her down the stairs feet first; dumping her in a church parking lot; and rifling through her purse. In 1983, this Court reviewed Elledge's statements and concluded that they were properly admitted. Elledge v. Graham, 432 So. 2d 35, 37 (Fla. 1983). We find no error.

As his sixth issue, Elledge maintains that the trial court should not have subjected him to a compelled mental health examination by the state's expert because there was no authority to compel the exam. We disagree. Florida Rule of Criminal Procedure 3.202(d) requires the court, in cases where the state seeks the death penalty and where the defendant intends to establish mental mitigation, to order that the defendant be examined by a mental health expert chosen by the state:

> Appointment of State Expert; Time of Examination. After the filing of such notice and on the motion of the state indicating its desire to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. Attorneys for the state and defendant may be present at the examination. The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony.

Although rule 3.202 became effective three years after Elledge's resentencing,[6] we find that the trial court did not abuse its discretion by compelling the exam in order to "level the playing field." See Dillbeck v. State, 643 So. 2d 1027, 1030 (Fla. 1994), cert. denied, 115 S. Ct. 1371 (1995). In Dillbeck, we reasoned that

> [a]llowing the state's expert to examine a defendant will keep the state from being unduly prejudiced because a defendant will not be able to rely on expert testimony

[6]Amendments to Florida Rule of Criminal Procedure 3.220--Discovery (3.202--Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial), 674 So. 2d 83, 83-84 (Fla. 1995)(effective January 1, 1996).

that the state has no effective means of rebutting.

Id. at 1030 (quoting State v. Hickson, 630 So. 2d 172, 176 (Fla. 1993)). The procedures undertaken in the instant case are consistent with the requirements set forth in rule 3.220 and in Dillbeck. We find no error.

Next, Elledge argues that the state's mental health expert, Dr. Harley Stock, was improperly allowed to rebut Professor Michael Radelet's testimony regarding Elledge's future dangerousness with the results of Elledge's compelled mental evaluation. Elledge contends that rule 3.202(b) only authorizes a compelled mental evaluation to rebut testimony from a mental health professional "who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances." Because Professor Radelet is not a mental health professional and he based his testimony on the results of his record review and statistical patterns analysis rather than a clinical interview, such as that conducted by Dr. Stock, Elledge claims the playing field was rendered unlevel. We disagree. Dr. Stock was engaged by the state to rebut Elledge's proposed mitigation regarding possible mental or emotional disturbance, possible impairment of his capacity to conform his conduct to the requirements of the law, and possible future dangerousness. Dr. Stock necessarily conducted a clinical interview with Elledge to rebut the mitigation presented by other defense experts (Drs. Schwartz and Caddy) who likewise conducted clinical interviews. Although Professor Radelet testified without conducting a clinical interview, it was not improper for Dr. Stock to rebut Professor Radelet's testimony with the information available to him from his evaluation. We find no error.

Elledge next claims that the trial court should have given his proposed jury instruction which addressed the nature and function of mitigating circumstances and described several non-statutory mitigators applicable in the instant case. We disagree. The jury was given the standard instruction which states it should consider "any other aspect of the defendant's character or record, and any other circumstances of the offense." See, e.g., Finney v. State, 660 So. 2d 674, 684 (Fla. 1995), cert. denied, 116 S. Ct. 823 (1996); Jones v. State, 612 So. 2d 1370, 1375 (Fla. 1992). We find no error.

We also disagree with Elledge's assertion that the trial court gave undue weight to the jury's death recommendation. The judge made comments such as the following to the jury:

> It is only under rare circumstances that this Court could impose a sentence other than what you, members of the jury, recommend.

In his sentencing order, however, the judge found compelling reasons to impose the death penalty other than the jury's recommendation. The judge "heard, reviewed and considered everything presented during the penalty phase, in memoranda, correspondence and subsequent hearings." He independently weighed the aggravation and mitigation and explained that the four statutory aggravating factors, which were proven beyond a reasonable doubt, substantially outweighed the three non-statutory mitigating factors. We find no error.

Elledge next argues that the trial judge erroneously applied a presumption of death because, citing to White v. State, 403 So. 2d 331 (Fla. 1981), he stated "death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances." Although the language from

White has been superseded in our recent cases,[7] we find that the trial court properly weighed the aggravating and mitigating circumstances.[8] We find no error.

Elledge next asserts that the trial court misstated the testimony of defense expert Dr. Caddy concerning the "extreme mental or emotional disturbance" statutory mitigator:

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[7]See, e.g., Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990)("[T]his Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation.'") (quoting Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989)).

[8]In his order, the trial judge stated:

> In summary, the Court finds that there are four (4) aggravating circumstances applicable to this case which have been proven beyond and to the exclusion of every reasonable doubt.
>
> As to mitigation, the Court finds a lack of significant mitigating circumstances. The Court finds zero (0) statutory mitigating factors and three (3) non-statutory mitigating circumstances have been proven by a preponderance of the evidence, though entitled to little weight cumulatively.
>
> The minimal significance which attaches to the non-statutory mitigating circumstances does not approach the weight of overwhelming statutory aggravating factors which have been established.
>
> . . . .
>
> It is the opinion of this Court that the facts and circumstances of this case demand the imposition of the death penalty and that, in fact, the aggravating circumstances clearly and convincingly outweigh the mitigating circumstances so that no reasonable person could differ.
>
> The Court finds the applicability of this mitigating circumstance was rebutted by the defendant's own expert. Dr. Caddy testified, based upon his examination of the defendant, interviews with family and friends, and, a review of the facts of this case, that it is his expert opinion was that the defendant was not under extreme mental or emotional disturbance when he committed the murder of Margaret Anne Strack.

We agree that the trial court misstated Dr. Caddy's views, which were that the mitigator applied to Elledge, but we find the error harmless in light of the court's reliance on Dr. Stock's conclusions:

> Dr. Stock concluded that the defendant did not suffer from fetal alcohol syndrome and found no indications of any organicity. Also, the defendant did not suffer from any mental illness, impulse control disorder, or post-traumatic stress disorder. Dr. Stock concluded that the defendant had an anti-social personality disorder. Dr. Stock testified that this is not a mental illness, but a life long history of a person who makes bad choices in life and that these choices are conscious and volitional.
>
> . . . .
>
> The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Margaret Anne Strack was comitted. As

such, the court finds that this mitigating circumstance does not apply.

On this record, we conclude beyond a reasonable doubt that the trial court's misstatement of Dr. Caddy's views did not affect the outcome. See State v. DiGuillio, 491 So. 2d 1129 (Fla. 1986).

Elledge next claims that the trial court failed to consider and find two proposed nonstatutory mitigators: 1) Elledge's history of drug and alcohol abuse and 2) mental health problems which do not rise to the level of statutory mitigation. We disagree. It is evident from the sentencing order that the trial court considered both proposed mitigators. The trial judge acknowledged that alcoholism influenced Elledge's life, and to the extent that his parents were alcoholic and he suffered the physical and mental abuse resulting from those circumstances, the court found nonstatutory mitigation. The judge rejected mental health problems as mitigation based on his findings that the statutory mitigators did not apply. The court found Dr. Stock credible when he testified that Elledge suffered no mental illness but had an anti-social personality disorder--meaning Elledge had a life-long history of making bad choices which were conscious and volitional. We find no error.

We likewise find that the trial court did not err in assigning "little weight" to child abuse as a nonstatutory mitigator. The "weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard." Blanco v. State, No. 85,118, slip op. at 4 (Fla. Sept. 18, 1997) (citing Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990)). The trial court found that Elledge had a difficult and abusive childhood, but was influenced by testimony revealing that Elledge enjoyed a close relationship with his father:

> Both Danny Elledge and Connie Moffett described their father as a kind and wonderful man. Father Ken Roach, former Jacksonville detective, testified that after being apprehended, the defendant spoke by telephone with his father. He said the defendant was very open and emotional with his father during the telephone call.

The trial court did not abuse its discretion, "for we cannot say that no reasonable person would give this circumstance [little] weight in the calculus of this crime." See id., slip op. at 4 (citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990) ("[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court.")). We find no error.

The remaining issues have already been decided adversely to Elledge[9] or are without merit.[10] Accordingly, the sentence of death is affirmed.

It is so ordered.

OVERTON, GRIMES, HARDING and WELLS, JJ., concur.
ANSTEAD, J., concurs in part and dissents in part with an opinion, in which SHAW, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF

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[9]Issues 16, 23, 24, 25, 26, and 27.

[10]Issues 8, 10, 11, 12, 13, and 19. Claim 9 (sustaining the prosecution's objection to the defense exercise of a peremptory challenge) is without merit because the trial judge dismissed the entire panel for other reasons and a new jury was selected.

FILED, DETERMINED.

ANSTEAD, J., concurring in part and dissenting in part.

While I agree with virtually all of the majority opinion and its conclusions, I do not agree that we can determine that the trial judge's explicit mistake of fact in his sentencing order concerning the nonexistence of a weighty statutory mental mitigator is "harmless error." We simply cannot say that there is no reasonable possibility that a trial court's misconception of the mental health testimony affected the trial court's weighing process in imposing the death sentence. The majority's analysis to the contrary is flawed in several regards.

In the usual case, the difficulty in applying a harmless error analysis is in determining whether there was a reasonable possibility that the trial adjudicator actually relied on the error in making a decision. Here we do not have that difficulty because the trial judge has explicitly told us in writing that he relied on his mistaken view of the expert's testimony in making his sentencing decision. Hence, contrary to the majority's analysis, the harmless error standard set out in DiGuilio cannot be met here, where the trial court explicitly relied on an incorrect view of mental health evidence as an important predicate to its conclusion that the death sentence should be imposed. This error can be corrected only by giving the trial court an opportunity to confront the mistake and then reconsider his analysis and conclusion in view of the mistake.

Furthermore, the majority's analysis also makes the common mistake explicitly warned against in DiGuilio of simply looking to see if there is "some evidence," besides that erroneously relied upon to prop up the trial judge's conclusion. By quoting another expert's testimony as "some evidence" to support the judge's finding, the majority has directly violated the DiGuilio harmless error standard.

The mistake here is obviously substantial; it involves the nature of critical expert witness testimony about the existence of an important statutory mental mitigating circumstance. Moreover, the mistake is clear on the face of the sentencing order in erroneously stating that the expert's opinion was exactly opposite of that testified to at trial. Of course, if the judge's erroneous statement had been correct, i.e., that defendant's own expert actually gave important mental health testimony against the defendant, such an opinion would have been devastating to the defendant's position. It is one thing to have evidence offered against a defendant at trial; it is quite another to have the defendant's own witness offer evidence against him on the critical issue at trial, i.e., his state of mind at the time of the offense. The effect of such damaging testimony on a fact finder is obvious, and the trial court's mistaken notion that that is what happened in the penalty phase of this case cannot be characterized as "harmless."

In my view we should remand this case to give the trial court an opportunity to reevaluate the evidence and the mitigating factors based on an accurate view of the evidence. It is the trial court, not this Court, that is responsible for the sentencing order, and we should not substitute our view of what we would have done knowing the true facts. We simply cannot know whether the important mental mitigating factor in question here would have been found to exist based on a correct view of the expert testimony and whether the trial court's subsequent analysis and conclusion would have been the same. Because we cannot tell, we should remand this case to the trial judge, who can tell us.

SHAW, J., concurs.

An Appeal from the Circuit Court in and for Broward County,
Charles M. Greene, Judge -
Case No. 75-87CF

Richard L. Jorandby, Public Defender and Richard B. Greene, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida,

for Appellant

Robert A. Butterworth, Attorney General and Carolyn M. Snurkowski, Assistant Deputy Attorney General, Tallahassee, Florida,

for Appellee

APPENDIX B

Motion for Rehearing

IN THE SUPREME COURT OF FLORIDA

WILLIAM D. ELLEDGE,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 83,321
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

MOTION FOR REHEARING

Appellant, William D. Elledge, hereby moves this Honorable Court to grant rehearing as to this Court's decision of September 18, 1997. He moves pursuant to Florida Rule of Appellate Procedure 9.330. This Honorable Court overlooked the following points of law and fact:

1. The majority's application of the harmless error rule concerning the judge's misstatement of Dr. Caddy's testimony is contrary to a long line of decisions of this Court and the United States Supreme Court. The decision is also based on a lack of analysis and on a selective quoting of the trial judge's order.

The majority recognized that the trial judge misstated Dr. Caddy's view regarding the statutory mental mitigating circumstance of "extreme mental or emotional disturbance." Slip opinion at 7-8. However, it held that this was harmless error. Justices Anstead and Shaw would hold that this is harmful error. Id. at 9-10. This Court should grant rehearing and hold the error to be harmful.

The majority analyzed the issue as follows:

> Elledge next asserts that the trial court misstated the testimony of defense expert Dr. Caddy concerning the "extreme mental or emotional disturbance" statutory mitigator:
>
> > The Court finds the applicability of this mitigating circumstance was rebutted by the defendant's own expert. Dr. Caddy testified, based upon his examination of the defendant, interviews with family and friends, and, a review of the facts of this case, that it is his expert opinion was that the defendant was not under extreme mental or emotional disturbance when he committed the murder of Margaret Anne Strack.
>
> We agree that the trial court misstated Dr. Caddy's views, which were that the mitigator applied to Elledge, but we find the error harmless in light of the court's reliance on Dr. Stock's conclusions:
>
> > Dr. Stock concluded that the defendant did not suffer from fetal alcohol syndrome and found no indications of any organicity. Also, the defendant did not suffer from any mental illness, impulse control disorder, or post-traumatic stress disorder. Dr. Stock concluded that the defendant had an anti-social personality disorder. Dr. Stock testified that this is not a mental illness, but a life long history of a person who makes bad choices in life and that these choices are conscious and volitional.
> >
> > • • •
> >
> > The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Margaret Anne Strack was committed. As such, the court finds that this mitigating circumstance does not apply.
>
> On this record, we conclude beyond a reasonable doubt that the trial court's misstatement of Dr. Caddy's views did not affect the outcome. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).
>
> Slip opinion at p. 7-8.

This analysis is directly contrary to numerous decisions of this Court and the United States Supreme Court. It is also based on a selective quoting of the trial judge's order.

This Court has repeatedly stated that the statutory mental mitigating circumstances are among the most significant mitigating circumstances in a capital case. Burns v. State, ___ So. 2d ___, 22 Fla. L. Weekly S419, 420 (Fla. July 10, 1997); Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Deangelo v. State, 616 So. 2d 440 (Fla. 1993); Songer v. State, 544 So. 2d 1010 (Fla. 1989); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). This Court has repeatedly held errors concerning the application of the statutory mental mitigating circumstances to be harmful. On three different occasions this Court has been faced with a situation where the trial judge applied the sanity standard in determining whether the statutory mental mitigating circumstances exist. This Court has consistently held this to be reversible error and ordered a resentencing. Campbell v. State, 571 So. 2d 415, 418-419 (Fla. 1990); Ferguson v. State, 417 So. 2d 631, 636-638 (Fla. 1982); Mines v. State, 390 So. 2d 332, 337 (Fla. 1980). In Ferguson, supra, this Court explained why such an error is almost always harmful:

> In our review capacity we must be able to ascertain whether the trial judge properly considered and weighed these mitigating factors. Their existence would not as a matter of law, invalidate a death sentence, for a trial judge in exercising a reasoned judgment could find that a death sentence is appropriate. It is improper for us, in our review capacity, to make such a judgment.
>
> 417 So. 2d at 638.

This Court recently reversed, in part, on a virtually identical error. Larkins v. State, 655 So. 2d 95, 100 (Fla. 1995). In Larkins, the trial court also misinterpreted a defense mental health expert's testimony concerning a statutory mental mitigator.

> The trial court concluded that Dr. Dee was not of the opinion that Larkins' condition was of such a nature that the defendant lacked the capacity to appreciate the criminality of his act or to conform his conduct to the requirements of law. In fact, Dr. Dee testified that Larkins' organic brain disorder "impairs his capacity to control that conduct whatever he appreciates it to be."
>
> 655 So. 2d at 100.

The majority cites no cases holding that an error in the construction of a statutory mental mitigating circumstance is harmless error.

The harmful nature of the error here is demonstrated by considering a slightly different situation. If the trial judge had refused to consider Dr. Caddy's testimony on this mitigator, this Court would have surely held this to be harmful error. See Eddings v. Oklahoma, 455 U. S. 104, 102 S. Ct. 869, 7 L. Ed.2d 1 (1982); Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986). The error in this case is far more harmful than failing to consider mitigating evidence. Here, the trial judge not only ignored powerful mitigating evidence, he actually turned that evidence into its opposite. The trial judge is relying on false evidence. This is far more damaging than a mere failure to consider mitigating evidence.

The majority also selectively quotes from the trial judge's order in order to make it appear that it is clear that the trial judge relied on Dr. Stock for his ultimate conclusion on this mitigator. The majority includes the following in its opinion.

> Dr. Stock concluded that the defendant did not suffer from fetal alcohol syndrome and found no indications of any organicity. Also, the defendant did not suffer from any mental illness, impulse control disorder, or post-traumatic stress disorder. Dr. Stock concluded that the defendant had an anti-social personality disorder. Dr. Stock testified that this is not a mental illness, but a life long history of a person who makes bad choices in life and that these choices are conscious and volitional.
>
> • • •

> The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Margaret Anne Strack was committed. As such, the court finds that this mitigating circumstance does not apply.

Slip opinion at p. 7-8.

The majority's use of ellipsis makes it appear that the trial judge concluded his analysis on this mitigating circumstance with a discussion of Dr. Stock's testimony. In fact, he concluded his analysis of this mitigating circumstance with his misstatement of Dr. Caddy's testimony. The judge actually concluded his analysis:

> The Court finds the applicability of this mitigating circumstance was rebutted by the defendant's own expert. Dr. Caddy testified, based upon his examination of the defendant, interviews with family and friends, and, a review of the facts of this case, that it is his expert opinion was that the defendant was not under extreme mental or emotional disturbance when he committed the murder of Margaret Anne Strack.
>
> The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Margaret Anne Strack was committed. As such, the court finds that this mitigating circumstance does not apply. See Nibert v. State, 574 So. 2d 1059 (Fla. 1990), rehearing denied; Duncan v. State, 619 So. 2d 279 (Fla. 1993).

Record 3759-3760.

The structure of the trial judge's order supports the conclusion that the error is harmful. The judge concludes his analysis of this mitigating circumstance with his misstatement that this mitigating circumstance "was rebutted by the defendant's own expert" R3759. The selective quotation and use of ellipses distorts this.

There is no principled way to know beyond a reasonable doubt that this error is harmless. The trial judge thought that two out of three experts, including a defense expert, had testified that

this mitigating circumstance did not apply. However, the truth was that two out of three experts had testified that the circumstance did apply and only the State's doctor had testified that it did not. This is a very different state of the evidence. The fact that the judge took the trouble to put this statement in his order is a strong indication that he felt it to be significant. There is no way to know beyond a reasonable doubt that the result would have been the same if the judge had correctly understood the evidence.

The majority's application of harmless error in this case is also contrary to the stated test of this Court and the requirements of the United States Supreme Court. This Court outlined the principles it applies concerning harmless error in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

> Harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence.

491 So. 2d at 1136.

The Court went on to state:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id. at 1139.

The majority in this case did precisely what this Court condemned in DiGuilio. The only arguments made by the majority in support of its conclusion that this error is harmless is to point out

that there is testimony from the State's expert to support the judge's conclusion. This is precisely the sort of sufficiency of the evidence test condemned in DiGuilio. Indeed, under the test applied by the majority every error would be harmless unless all of the evidence supporting the conviction or sentence was improper. This has never been the law of Florida. There is no way, consistent with DiGuilio, to say beyond a reasonable doubt that the trial judge's mistaken belief that the defendant's own expert had testified against him on this critical mitigator did not affect the judge.

The majority's use of harmless error in this case is also the sort of conclusory statement condemned by the United States Supreme Court . In Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) the United States Supreme Court reversed the Mississippi Supreme Court for its "cryptic holding" that an error in capital sentencing was "harmless beyond a reasonable doubt" without further explanation. In Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L. Ed.2d 326 (1992) Justice O'Connor further explained the dangers of such a conclusory statement.

> I join the Court's opinion but write separately to set forth my understanding that the Court does not hold that an appellate court can fulfill its obligation of meaningful review by simply reciting the formula for harmless error. In *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967), we held that before a federal constitutional error can be held harmless, the reviewing court must find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*, at 24, 87 S.Ct., at 828. This is a justifiably high standard, and while it can be met without uttering the magic words "harmless error," see *ante*, at 2122-2123, the reverse is not true. An appellate court's bald assertion that an error of constitutional dimensions was "harmless" cannot substitute for a principled explanation of how the court reached that conclusion. In *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), for example, we did not hesitate to remand a case for "a detailed explanation based on the record" when the lower court failed to undertake an explicit analysis supporting its "cryptic," one-sentence conclusion of harmless error. *Id.*, at 753, 110 S.Ct., at 1451. I agree with the Court that the Florida Supreme Court's discussion of the proportionality of petitioner's sentence is not an acceptable substitute for harmless error analysis, see *ante*, at 2122-2123, and I do not understand the Court to say that the mere addition of the words "harmless error" would have sufficed to satisfy the dictates of *Clemons*.
>
> 504 U.S. at 541 (Opinion of O'Connor, J., concurring).

Here, this Court relied on the same sort of conclusory statement. The majority's application of the harmless error rule to this issue is contrary is its own stated principles, its treatment of similar error regarding the statutory mental mitigators, and the decisions of the United States Supreme Court. This Court should grant rehearing as to this issue and find the error to be harmful.

In Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1992), the United States Supreme Court held that for an error to be harmless the verdict (or sentence) must be "surely unattributable to the error." This Court makes no attempt to comply with this standard. There is no way to show that the sentence was "surely unattributable" to this error. Indeed, there is every indication that this error contributed to this sentence. The trial court specifically concluded his analysis of this important statutory mitigator with this error.

The error in this case is also akin to that found to be harmful in Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). In Johnson, the trial court had relied on an invalid conviction in finding an aggravator. The United States Supreme Court held that this reliance on false information violated the Eighth Amendment and was clearly harmful. Here, the trial court explicitly relied on false information in rejecting an important statutory mental mitigating circumstance.

2. The Court finds that the trial judge employed an erroneous presumption of death and yet also states that this was not error. This is internally contradictory. This Court stated:

> Elledge next argues that the trial judge erroneously applied a presumption of death because, citing to White v. State, 403 So. 2d 331 (Fla. 1981), he stated "death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances." Although the language from White has been superseded in our recent cases, we find that the trial court properly weighed the aggravating and mitigating circumstances. We find no error.
>
> Slip opinion at p. 6-7 (footnotes omitted).

This Court has stated that the trial judge has employed an improper death presumption, yet somehow claims that there is "no error". There is no basis in law or logic for the proposition that a trial judge can rely on an erroneous death presumption and there be "no error."

This erroneous death presumption is a serious constitutional error. The Eleventh Circuit Court of Appeals has held the use of the death presumption employed by the judge in this case to violate the Eighth Amendment. Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). In Jackson, supra, the court struck down a jury instruction identical to the formulation utilized by the trial judge in this case. The court stated:

> In the present case, the terminology that death is presumed appropriate seeped into the sentencing instructions given by the trial judge. The jury was instructed:
>
> > When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.
>
> Jackson contends that such an instruction amounts to constitutional error. We agree....
>
> In this case, however, the jury was instructed that death was presumed to be the appropriate penalty. Justice McDonald of the Florida Supreme Court has astutely pointed out the problems created when such a presumption is relied upon by the sentencing authority:

> I would also like to comment on the reference in the majority opinion in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). I do not embrace the language from that opinion recited in this majority opinion as "when one or more of the aggravating circumstances is found death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." If that language is restricted to the role of this Court in reviewing death sentences imposed by the trial court, it is acceptable. But I fear that it is construed by the trial judges as a directive to impose the death penalty if an aggravating factor exists that is not clearly overridden by a statutory mitigating factor. The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be exercised with extreme care. I am unwilling to say that a trial judge should presume death to be the proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor.
>
> *Randolph v. State*, No. 54-896 (Fla. Nov. 10, 1983) (LEXIS, States Library, Fla. file) (McDonald, J., dissenting), withdrawn, 463 So. 2d 186 (Fla. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 6565 (1985).
>
> Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment.
>
> 837 F.2d at 1473 (emphasis supplied).

The Eleventh Circuit correctly held that when the sentencer employs such a death presumption it violates the Eighth Amendment. In the Florida scheme both the judge and jury play a constitutionally significant role in sentencing. The judge employing such an erroneous presumption is constitutional error.

The United States Supreme Court has adopted the Eleventh Circuit's view that this sort of death presumption is unconstitutional. Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108

L.Ed.2d 725 (1990); Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). This Court has, in essence, found federal constitutional error and done no harmless error analysis. This is contrary to DiGuilio, Sochor and Clemons.

3. The Court's analysis of the guilty plea issue makes it appear that this is premised entirely on Koenig v. State, 597 So. 2d 256 (Fla. 1992). However, the plea in this case is violative of the requirements of the United States Constitution as laid out in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491. Third, is the right to confront one's accusers. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. We cannot presume a waiver of these three important federal rights from a silent record.
>
> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which the courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.
>
> Boykin, supra, 397 U.S. at 243-244.

A guilty plea taken without an express waiver of all three rights is presumed to be invalid. United States v. Cornelius, 999 F.2d 1293 (8th Cir. 1993). The guilty plea in the current case was deficient even concerning these core federal constitutional minimums. There is absolutely no discussion of the privilege against self-incrimination or the right to confront one's accusers R3097-3112. In Cornelius, supra, the Court found a plea to be constitutionally invalid due to the exact same deficiencies. 999 F.2d at 1295. Boykin was decided well before the current plea was entered. The failure to inform Mr. Elledge of the privilege against self-incrimination and the right to confront his

accusers violates Boykin. This plea was taken in violation of the United States Constitution under the law at the time it was entered.

The Court's treatment of the guilty plea issue overlooks two other critical defects in the colloquy. The trial court failed to explain the elements of the offense. The colloquy also revealed the defense of intoxication, which was never explored by the judge. The trial court never explained the elements of first degree murder. It never explained the elements of premeditation or felony-murder R3097-3112. It is well-settled that a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969).

The failure to explain either premeditated murder or felony murder requires reversal. This is similar to the deficiencies in the colloquy which led to reversal in Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). In Henderson, supra, the United States Supreme Court held that a plea to second degree murder was constitutionally involuntary when there has been no explanation of the intent requirement for second degree murder. The Court reached this result even though it assumed the prosecution had "overwhelming evidence of guilt" and that the defendant had competent counsel who properly advised him to plead guilty to second-degree murder. 426 U.S. at 645.

The federal courts of appeal have followed the rule of Henderson, supra, to invalidate guilty pleas in state court proceedings. Nash v. Israel, 707 F.2d 298 (7th Cir. 1983); Hayes v. Kinchloe, 784 F.2d 1434 (9th Cir. 1986). In Nash, supra, the Court held a guilty plea to a charge of first degree murder to be involuntary where the state trial judge had failed to explain the intent element of first degree murder. In Hayes, supra, the Court held a guilty plea to be involuntary where the state trial judge had failed to explain the intent requirement of second degree murder. In the present case, there

was a complete failure to explain the elements of premeditated murder or felony murder. Henderson, Nash, and Hayes all mandate reversal.

The failure to explain the elements of premeditated murder or felony murder was especially prejudicial in the current case as the colloquy itself revealed a possible defense to first degree murder that went unexplored. Although Mr. Elledge stated that he killed the woman, he also made several statements which would indicate the defense of intoxication was available R3106-3110. He stated that he had "no less than ten" drinks shortly before the homicide R3106. He also stated that he smoked marijuana and "got good and loaded." He stated he was "pretty well loaded" R3110. He stated "I just kind of blew my cool.... I just kind of well, freaked out" R3108. He also stated "I just kind of blacked out and lost all control of what I was doing" R3108. Mr. Elledge made several statements during the plea colloquy which raise significant doubts as to whether he had the necessary intent for first degree murder. He also made statements which would raise the possibility of a defense of voluntary intoxication. The trial court made no attempt to explore these issues.

It is well settled that when a defendant raises a possible defense during a guilty plea, the trial court must make an extensive inquiry into the factual basis for the plea. State v. Kendrick, 336 So. 2d 353, 355 (Fla. 1976); Andrews v. State, 343 So. 2d 844, 846 (Fla. 1st DCA 1976); Davis v. State, 605 So. 2d 936 (Fla. 1st DCA 1992); Williams v. State, 534 So. 2d 929, 934 (Fla. 4th DCA 1988); United States v. Frye, 738 F.2d 196 (7th Cir. 1984); United States v. Groll, 992 F.2d 755 (7th Cir. 1993). The present case is similar to Davis, supra. In Davis, the defendant was charged with first degree murder and kidnapping. He did not contest the underlying facts, but stated that he was intoxicated at the time. The Court stated:

> Voluntary intoxication is a defense to the specific intent crime of first degree murder. *Gardner v. State*, 480 So. 2d 91, 92 (Fla. 1985); *Burch v. State*, 478 So. 2d 1050 (Fla. 1985). Therefore, appellant's statements raised the possibility of a defense, i.e., that he lacked the specific intent to commit the crime charged. At that point, the trial judge was obligated to inquire further, to determine whether a defense existed, and if so, whether appellant was aware of, and knowingly waived, such possible defense.

605 So. 2d at 938.

In the present case there was a complete failure to explain the elements of premeditated murder or felony murder. There were numerous statements raising doubts about Mr. Elledge's intent, and there were several statements raising the possibility of intoxication. None of this was clarified by the colloquy. Mr. Elledge's motion to withdraw his plea should have been granted.

4. This Court's treatment of the use of Dr. Stock's compelled mental evaluation to rebut the testimony of Professor Radelet misapprehends the record and overlooks prior decisions of this Court. This Court stated:

> Next, Elledge argues that the state's mental health expert, Dr Harley Stock, was improperly allowed to rebut Professor Michael Radelet's testimony regarding Elledge's future dangerousness with the results of Elledge's compelled mental evaluation. Elledge contends that rule 3.202(b) only authorizes a compelled mental evaluation to rebut testimony from a mental health professional "who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances." Because Professor Radelet is not a mental health professional and he based his testimony on the results of his record review and statistical patterns analysis rather than a clinical interview, such as that conducted by Dr. Stock, Elledge claims the playing field was rendered unlevel. We disagree. Dr. Stock was engaged by the state to rebut Elledge's proposed mitigation regarding possible mental or emotional disturbance, possible impairment of his capacity to conform his conduct to the requirements of the law, and possible future dangerousness. Dr. Stock necessarily conducted a clinical interview with Elledge to rebut the mitigation presented by other defense experts (Drs. Schwartz and Caddy) who likewise conducted clinical interviews. Although Professor Radelet testified without conducting a clinical interview, it was not improper for Dr. Stock to rebut Professor Radelet's testimony

with the information available to him from his evaluation. We find no error.

Slip opinion at p. 6.

This Court's statement that Dr. Stock was engaged by the State to discuss "possible future dangerousness" is simply incorrect. In the prosecution's motion for a compelled mental evaluation it laid out the proposed parameters of this testimony. The prosecution filed a motion for a compelled mental health examination R3307-3315. The core of the prosecution's argument for its exam was as follows:

> In order to convince the jury to recommend and this Court to sentence the Defendant to life imprisonment, the Defendant has listed five (5) mental health experts as witnesses. These individuals have interviewed the Defendant and have formed opinions as to the Defendant's mental state at the time of the offense, based in part on the interview and testing of the Defendant. Those opinions will be used by the defendant to establish the existence of either statutory or non-statutory mental mitigating factors during the penalty phase.

R3307-3308 (emphasis supplied).

Contrary to this Court's opinion, the State's motion only asked for an evaluation to rebut the testimony of mental health experts who had examined Mr. Elledge concerning his mental state at the time of the offense. The prosecution then changed its course after the evaluation and abandoned its original stated limitation and used the compelled evaluation to rebut other mitigation. This is precisely the danger that this Court recognized in Parkin v. State, 238 So. 2d 817 (Fla. 1979). In Parkin, this Court expressed concern that a compelled mental evaluation could go beyond its original scope and become a "hunting license". Id. at 821. This is precisely what occurred in this case. The State obtained the compelled evaluation for one purpose and then used it for a completely different purpose. This Court's opinion seems to place no limits on this sort of activity.

The failure of the State to lay out future dangerousness as an aspect of the examination raises additional constitutional problems. In Powell v. Texas, 492 So. 2d 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989), the State moved for a psychiatric examination as to competency and sanity. The State's doctor then attempted to testify at the penalty phase as to future dangerousness. The United States Supreme Court unanimously held that this violated the Sixth Amendment as counsel had no notice of the scope of the examination. The Court held that counsel should have been informed that the examination would include future dangerousness. The precise error occurred in this case. The State obtained the examination to rebut mental health testimony concerning "the Defendant's mental state at the time of the offense" R3307-3308. As in Powell, the examination and testimony improperly went on to cover future dangerousness. The Court's misapprehension of the record is significant. The Court is overlooking a clear Sixth Amendment violation. This Court should grant rehearing and grant a new penalty phase.

Wherefore, Appellant, William D. Elledge, respectfully requests this Honorable Court to grant his Motion for Rehearing.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida

Richard B. Greene

RICHARD B. GREENE
Assistant Public Defender
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No. 265446

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Carolyn Snurkowki, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050 this 1st day of October, 1997.

Richard B. Greene

RICHARD B. GREENE
Assistant Public Defender

APPENDIX C

Final Opinion of Florida Supreme Court

(1995). I find it difficult to believe that a former rape victim who expressed concern about her assailant's early release and recidivism would not be "interested in any issue tried" where her options are to vote for the death penalty or risk the eventual parole of another convicted rapist (and murderer) who might "[do] it again."

"[J]urors should if possible be not only impartial, but beyond even the suspicion of partiality." *Hill v. State*, 477 So.2d 553, 556 (Fla.1985) (quoting *O'Connor v. State*, 9 Fla. 215, 222 (1860)). I would find that Ms. K. should have been excused upon Gore's challenge for cause for the following reasons: (1) she violated the court's order by discussing the case with her husband; (2) her responses regarding her ability to be impartial were equivocal; and (3) it is clear from the record that Ms. K. was raped at knifepoint, was traumatized by the experience and was bothered by the fact that her assailant who received a twenty-year sentence only served six. Once he was released, he apparently raped again; "they let him out and he did it again." A juror with these concerns should not be sitting on a case where she is called upon to determine whether the defendant, a convicted rapist, should be sentenced to life without parole for twenty-five years or death. When such a juror is challenged for cause, prudence would dictate that doubt as to the juror's impartiality should be resolved in favor of granting the challenge. Denying the challenge under these circumstances was an abuse of discretion. Consistent with my belief that Gore was denied an impartial and unbiased jury, I would reverse.[14]

ANSTEAD, J., concurs.

14. Ms. K. sat on the jury even though Gore challenged her for cause, asked for additional peremptory challenges, specifically naming her as an objectionable juror, and after exhausting his peremptory challenges (including the additional one granted by the court) on other objectionable jurors, Gore objected to all the challenged jurors prior to the panel being sworn. *See Trotter v. State*, 576 So.2d 691, 693 (Fla.1990) ("Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted.").

William D. ELLEDGE, Appellant,

v.

STATE of Florida, Appellee.

No. 83321.

Supreme Court of Florida.

Sept. 18, 1997.

Rehearing Denied March 5, 1998.

Defendant pleaded guilty to murder and was sentenced to death. After sentence was affirmed on direct appeal, 408 So.2d 1021, defendant obtained federal habeas corpus relief, 823 F.2d 1439. On remand, defendant was again sentenced to death, but sentence was vacated, 613 So.2d 434. On remand to the Circuit Court, Broward County, Charles M. Greene, J., defendant again received death sentence, and he appealed. The Supreme Court held that: (1) plea was properly accepted; (2) state's introduction of details of two prior homicide convictions was not error; (3) state properly cross-examined witness about facts of prior murder; (4) sentencing court had power to compel defendant to submit to mental health examination by state's expert; (5) state's expert did not wrongly use results of compelled examination to rebut testimony of defendant's expert; (6) defendant's proposed jury instruction was properly rejected; (7) trial judge did not give undue weight to jury's death recommendation; (8) trial judge did not erroneously apply presumption of death; (9) trial court's misstatement of defense expert's views regarding mitigator was harmless error; and (10) trial court did not wrongly assign "little weight" to child abuse as nonstatutory mitigator.

Affirmed.

Anstead, J., concurred in part and dissented in part and filed opinion in which Shaw, J., joined.

1. Courts ⇐100(1)

Koenig decision explaining requirements of rule governing taking of pleas in criminal cases did not apply in resentencing proceedings in which murder defendant was attempting to withdraw guilty plea entered almost 17 years before decision was rendered. West's F.S.A. RCrP Rules 3.170(j), 3.172(c).

2. Criminal Law ⇐273.1(4)

Plea colloquy showed that defendant had full understanding of significance of his plea and its voluntariness when he pleaded guilty to murder, as required for plea to be accepted under former version of rule governing pleas. West's F.S.A. RCrP Rule 3.170(j).

3. Criminal Law ⇐661

Trial court in capital sentencing hearing did not err by allowing state to introduce details of two prior homicide convictions in face of defendant's offer to stipulate to their validity, especially since details of the prior homicides did not become feature of case.

4. Witnesses ⇐269(2.1)

Prosecutor in capital sentencing hearing could, in cross-examining police officer who had interrogated murder defendant and taken his first statement, inquire about facts of prior murder, notwithstanding defendant's contention that this exceeded scope of direct examination.

5. Criminal Law ⇐627.5(3)

Trial court in capital sentencing proceeding had authority to compel defendant to submit to mental health examination by state's expert, even though rule granting such authority had not yet been adopted. West's F.S.A. RCrP Rule 3.202.

6. Criminal Law ⇐486(6)

State's mental health expert testifying in capital sentencing hearing could use results of defendant's compelled mental evaluation to rebut testimony from defendant's expert regarding defendant's future dangerousness, even though defendant's expert was not mental health professional and had based his testimony on results of his record review and statistical-patterns analysis rather than clinical interview. West's F.S.A. RCrP Rule 3.202(b).

7. Criminal Law ⇐829(22)

Trial court in capital sentencing hearing did not err in refusing defendant's proposed jury instruction which addressed nature and function of mitigating circumstances and described several nonstatutory mitigators, where jury was given standard instruction which told it to consider "any other aspect of the defendant's character or record, and any other circumstances of the offense."

8. Homicide ⇐358(3)

Trial judge's comment in capital sentencing hearing that court only rarely imposed sentence other than that recommended by jury did not establish that judge gave undue weight to jury's death recommendation, where judge in his sentencing order found compelling reasons to impose death penalty other than jury's recommendation.

9. Homicide ⇐358(3)

Trial judge's statement during capital sentencing hearing that "death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances" did not establish that he erroneously applied presumption of death, where he properly weighed aggravating and mitigating circumstances.

10. Homicide ⇐343

Trial court's misstatement, in capital sentencing hearing, of defense expert's views about applicability of "extreme mental or emotional disturbance" statutory mitigator was harmless error in light of court's reliance on conclusions of state's expert.

11. Homicide ⇐357(4)

Trial court in capital sentencing hearing did not err in assigning "little weight" to child abuse as nonstatutory mitigator where it found that defendant enjoyed close relationship with his father.

12. Criminal Law ⇐1147, 1208.1(5)

Weight assigned to mitigating circumstance in capital sentencing hearing is within trial court's discretion and is subject to abuse of discretion standard.

Richard L. Jorandby, Public Defender, Richard B. Greene, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for Appellant.

Robert A. Butterworth, Attorney General, Carolyn M. Snurkowski, Assistant Deputy Attorney General, Tallahassee, for Appellee.

PER CURIAM.

We have on appeal a trial court order imposing the death sentence upon William D. Elledge following resentencing. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm.

In 1974, Elledge confessed to a weekend of crimes which included the rape and murder of Margaret Anne Strack and the murder and robbery of Edward Gaffney and Kenneth Nelson.[1] Elledge pled guilty to the murder and robbery of both Nelson and Gaffney and to the rape and murder of Strack. He was sentenced to life imprisonment for the Nelson and Gaffney murders, and in March 1975, he was sentenced to death for the murder of Strack.

This Court reversed and remanded his case for resentencing in *Elledge v. State*, 346 So.2d 998 (Fla.1977). On remand, Elledge was again sentenced to death, and that sentence was affirmed by this Court in *Elledge v. State*, 408 So.2d 1021 (Fla.1981). Elledge's subsequent motion for post-conviction relief and a state habeas corpus petition were denied in *Elledge v. Graham*, 432 So.2d 35 (Fla.1983). However, Elledge received federal habeas relief in *Elledge v. Dugger*, 823 F.2d 1439 (11th Cir.), *reh'g granted in part*, 833 F.2d 250 (11th Cir.1987). Elledge's third sentencing proceeding was held in 1989 and he was again sentenced to death. That death sentence was vacated in *Elledge v. State*, 613 So.2d 434 (Fla.1993).

Elledge's fourth sentencing proceeding took place in November 1993 and is the subject of the instant appeal. The jury recommended death by a vote of nine to three. The trial judge found four aggravating circumstances,[2] no statutory mitigating circumstances, and three nonstatutory mitigating circumstances[3] to which he attributed little weight cumulatively. Finding that the mitigating circumstances were substantially outweighed by the aggravating circumstances, the trial court sentenced Elledge to death. Elledge raises twenty-seven issues in this appeal.[4]

1. The facts are set out fully in *Elledge v. State*, 346 So.2d 998, 999 (Fla.1977).

2. Aggravating factors: (1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the defendant was engaged in the commission of, attempt to commit, or escape after committing a rape; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the capital felony was especially heinous, atrocious, or cruel.

3. Non-statutory mitigating factors: (1) the defendant had a difficult and abusive childhood; (2) the defendant demonstrated some cooperation by confessing after he was caught; (3) the defendant was a friend and provider of support while incarcerated.

4. Whether the trial court erred by: (1) denying Elledge's motion to withdraw his guilty plea; (2) allowing the state to introduce the details of prior violent felony convictions; (3) allowing testimony concerning prior violent felonies to become a feature of the case; (4) allowing improper cross-examination of Ken Roach; (5) allowing inflammatory evidence of after-death activity; (6) subjecting Elledge to a compelled mental health examination by a prosecution expert; (7) allowing the state to use a compelled mental health evaluation to rebut mitigation not based on a mental health examination; (8) denying defense counsel's request to have his expert view the in-court testimony of the prosecution's mental health expert; (9) sustaining the prosecution's objection to the defense exercise of a peremptory challenge; (10) restricting voir dire; (11) its extraordinary delay in providing a lawful penalty phase; (12) denying Elledge's motion to preclude death based on an unconstitutional delay; (13) giving an improper instruction on reasonable doubt; (14) refusing to instruct the jury on nonstatutory mitigation; (15) failing to explain the nature and function of mitigating circumstances; (16) giving an unconstitutional instruction on the HAC aggravating circumstance; (17) giving undue weight to the jury's death recommendation; (18) applying a presumption of death; (19) failing to consider and/or find the statutory mitigating factor described in section 921.141(6)(c), Florida Statutes, ("The victim was a participant in the defendant's conduct or consented to the act"); (20) basing its order on partially false information; (21) failing to consider and find nonstatutory mitigating circumstances proposed by defense counsel; (22) inaccurately evaluating child abuse as a mitigator, both factually and legally; (23) instructing the jury and finding the avoid arrest aggravator; (24) finding the HAC aggravator and in instructing the jury on this aggravator; and (25) whether the felony murder aggravating circumstance (§ 921.141(5)(d)) is unconstitutional on its face and as applied in this case; (26) whether electrocution violates the state and federal constitutions; (27) whether Florida's death penalty statute is unconstitutional.

[1, 2] Elledge first argues that the trial court erred by denying his motion to withdraw his 1975 guilty plea in light of *Koenig v. State*, 597 So.2d 256 (Fla.1992).[5] We disagree. Florida Rule of Criminal Procedure 3.170(j) (1973), which governed the taking of guilty pleas in 1975, stated:

> Responsibility of Court on Pleas. No plea of guilty or nolo contendere shall be accepted by a court without first determining, in open court, with means of recording the proceedings stenographically or by mechanical means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty.

The following excerpt is from the plea colloquy which occurred between Elledge and the court in March 1975:

> THE COURT: Is the defendant going to enter a plea of guilty as to both counts in the Indictment?
>
> MR. McCAIN [DEFENSE COUNSEL]: That's correct.
>
> THE COURT: Will the defendant and his attorney approach the bench, please? Is that what you want to do, Mr. Elledge?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: When you plead guilty to a charge, Mr. Elledge, you are admitting the truth of the facts alleged by the State in this Information. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Of course, when you plead not guilty, you deny that.
>
> You do understand that you are entitled to have a trial by jury—
>
> THE DEFENDANT: Yes.
>
> . . . .
>
> THE COURT: Mr. Elledge, under the law, you could be sentenced to a sentence of death in this charge of first degree murder. Do you understand that?
>
> THE DEFENDANT: Yes; I do.
>
> . . . .
>
> [THE COURT:] On Count I, murder in the first degree, Mr. Elledge, the Court doesn't have any choice, if you are sentenced to life instead of death. That is the only two sentences on that offense. So the Court can't put you on probation, or anything lesser than that. Do you understand that?
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: You are represented by Mr. McCain, who is standing here with you. Have you discussed fully with him your case, and told him everything that you know about it?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Has Mr. McCain discussed with you any defenses that might be available in the case?
>
> THE DEFENDANT: Yes; we have.
>
> THE COURT: Has he given you the benefit of his advice?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Are you satisfied that Mr. McCain has represented you the best

5. In *Koenig*, we explained the requirements of Florida Rule of Criminal Procedure 3.172(c), governing the taking of pleas in criminal cases:

> The rule specifically provides that a trial judge should, in determining the voluntariness of a plea, inquire into the defendant's understanding of the fact that he is giving up the right to plead not guilty, the right to a trial by jury with the assistance of counsel, the right to compel the attendance of witnesses on his behalf, the right to confront and cross-examine adverse witnesses, and the right to avoid compelled self-incrimination.

597 So.2d at 258.

he can, and done what could be expected of him?

THE DEFENDANT: Yes, I am.

THE COURT: Is anybody forcing you to plead guilty?

THE DEFENDANT: No.

. . . .

THE COURT: Has anybody promised you anything in any way, that you are going to be rewarded in any fashion, or you are going to get probation or leniency, or a life sentence like if you plead guilty?

THE DEFENDANT: No; they haven't.

. . . .

[THE COURT:] Knowing that you could be sentenced to death for this crime of murder in the first degree, Mr. Elledge, do you still wish to plead guilty? Mr. Elledge, do you still wish to plead guilty?

THE DEFENDANT: Yes; I do.

THE COURT: Knowing you could be sentenced to life in prison, or any number of years with a minimum of 30 years on the rape in Count II, do you still wish to plead guilty to that?

THE DEFENDANT: Yes.

THE COURT: The Court will make the finding that William Duane Elledge knows what he is doing; that he intelligently, understandingly and advisingly wishes to plead guilty to the charge of murder in the first degree as alleged in Count I of this Indictment; and plead guilty to the charge of rape as alleged in Count II of this Indictment.

The Court, therefore, accepts these pleas and they shall be so entered.

. . . .

[THE COURT:] Accordingly, based upon your plea and the factual testimony presented here, the Court will adjudge you to be guilty of the crime of murder in the first degree as alleged in Count I.

The Court will hereby adjudge you to be guilty of the crime of rape as alleged in Count II.

We conclude that Elledge had "full understanding of the significance of his plea and its voluntariness" as required by rule 3.170(j). *See Elledge v. Graham*, 432 So.2d 35, 37 (Fla.1983)("[T]he appellant's confessions and guilty plea were properly admitted."). We find our decision in *Koenig*, rendered almost seventeen years after the plea was entered, inapplicable. *See Preston v. State*, 444 So.2d 939, 942 (Fla.1984) ("[R]econsideration [of law of the case] is warranted only in exceptional circumstances and where reliance on the previous decision would result in manifest injustice."). We find no error.

[3] Elledge next asserts that the trial court erred in allowing the state to introduce the details of two prior violent felony convictions (Gaffney and Nelson homicides) because he offered to stipulate to their validity. This issue has been decided adversely to Elledge. *Freeman v. State*, 563 So.2d 73, 76 (Fla.1990); *Perri v. State*, 441 So.2d 606, 607–08 (Fla.1983)("In the sentencing proceeding, testimony about the details of a prior violent felony involving the use or threat of violence to the person is properly admitted."). We likewise find from our review of the record that the details of the two prior homicides did not become a feature of the case. Thus, we find no error.

[4] Next, Elledge contends that the prosecutor's cross-examination of Ken Roach, the police officer who interrogated him and took his first statement, was beyond the scope of direct examination and was an attempt to elicit improper details of a prior violent felony, the Nelson murder. We disagree. Defense counsel elicited, *inter alia*, that Roach was an acquaintance of Nelson; that he talked to Mrs. Nelson at the time of the crime; and that Elledge finally confessed to Roach about the Strack, Nelson and Gaffney murders:

> ROACH: And then shortly thereafter during a period of silence [Elledge] just volunteered his confession to me.
>
> DEFENSE COUNSEL: What was that? What was that like, Father?
>
> ROACH: He told me that he had killed the girl in a motel room in Hollywood, Florida. That he had shot the man in the store while he was in the process of trying to find some money. And then he had taken a bus to Jacksonville and paid his way out to Jacksonville Beach and walked out on the beach and found this Beacon Motel. And went in and under the pretense of renting a room and had a gun with him that he had taken from a prior scene, and he got the jump on the people, tied them up and that Mr. Nelson got loose from his bounds and, you know, that he shot him.

Accordingly, we conclude that the trial court did not abuse its discretion by allowing the prosecutor to cross-examine Roach on the facts of Nelson's murder such as the number of shots fired, the type of weapon used and where it was found. *Jones v. State*, 580 So.2d 143, 145 (Fla.1991)("Trial courts have wide latitude to impose reasonable limits on the scope of cross-examination."). We find no error.

We also reject Elledge's claim that the court erred by allowing evidence of after-death activity. In his taped statement, Elledge described activities such as putting the top half of Strack's body over the edge of the bathtub and washing the blood from her nose; grabbing hold of her feet, throwing her out the back door and rolling her down the stairs feet first; dumping her in a church parking lot; and rifling through her purse. In 1983, this Court reviewed Elledge's statements and concluded that they were properly admitted. *Elledge v. Graham*, 432 So.2d 35, 37 (Fla.1983). We find no error.

[5] As his sixth issue, Elledge maintains that the trial court should not have subjected him to a compelled mental health examination by the state's expert because there was no authority to compel the exam. We disagree. Florida Rule of Criminal Procedure 3.202(d) requires the court, in cases where the state seeks the death penalty and where the defendant intends to establish mental mitigation, to order that the defendant be examined by a mental health expert chosen by the state:

> Appointment of State Expert; Time of Examination. After the filing of such notice and on the motion of the state indicating its desire to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. Attorneys for the state and defendant may be present at the examination. The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony.

Although rule 3.202 became effective three years after Elledge's resentencing,[6] we find that the trial court did not abuse its discretion by compelling the exam in order to "level the playing field." *See Dillbeck v. State*, 643 So.2d 1027, 1030 (Fla.1994), *cert. denied*, 514 U.S. 1022, 115 S.Ct. 1371, 131 L.Ed.2d 226 (1995). In *Dillbeck*, we reasoned that

> [a]llowing the state's expert to examine a defendant will keep the state from being unduly prejudiced because a defendant will not be able to rely on expert testimony that the state has no effective means of rebutting.

Id. at 1030 (quoting *State v. Hickson*, 630 So.2d 172, 176 (Fla.1993)). The procedures undertaken in the instant case are consistent with the requirements set forth in rule 3.220 and in *Dillbeck*. We find no error.

[6] Next, Elledge argues that the state's mental health expert, Dr. Harley Stock, was improperly allowed to rebut Professor Michael Radelet's testimony regarding Elledge's future dangerousness with the results of Elledge's compelled mental evaluation. Elledge contends that rule 3.202(b) only authorizes a compelled mental evaluation to rebut testimony from a mental health professional "who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances." Because Professor Radelet is not a mental health professional and he based his testimony on the results of his record review and statistical patterns analysis rather than a clinical interview, such as that conducted by Dr. Stock, Elledge claims the playing field was rendered unlevel. We disagree. Dr. Stock

6. *Amendments to Florida Rule of Criminal Procedure 3.220—Discovery (3.202—Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial)*, 674 So.2d 83, 83–84 (Fla.1995)(effective January 1, 1996).

was engaged by the state to rebut Elledge's proposed mitigation regarding possible mental or emotional disturbance, possible impairment of his capacity to conform his conduct to the requirements of the law, and possible future dangerousness. Dr. Stock necessarily conducted a clinical interview with Elledge to rebut the mitigation presented by other defense experts (Drs. Schwartz and Caddy) who likewise conducted clinical interviews. Although Professor Radelet testified without conducting a clinical interview, it was not improper for Dr. Stock to rebut Professor Radelet's testimony with the information available to him from his evaluation. We find no error.

[7] Elledge next claims that the trial court should have given his proposed jury instruction which addressed the nature and function of mitigating circumstances and described several non-statutory mitigators applicable in the instant case. We disagree. The jury was given the standard instruction which states it should consider "any other aspect of the defendant's character or record, and any other circumstances of the offense." *See, e.g., Finney v. State*, 660 So.2d 674, 684 (Fla.1995), *cert. denied*, 516 U.S. 1096, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996); *Jones v. State*, 612 So.2d 1370, 1375 (Fla.1992). We find no error.

[8] We also disagree with Elledge's assertion that the trial court gave undue weight to the jury's death recommendation. The judge made comments such as the following to the jury:

> It is only under rare circumstances that this Court could impose a sentence other than what you, members of the jury, recommend.

In his sentencing order, however, the judge found compelling reasons to impose the death penalty other than the jury's recommendation. The judge "heard, reviewed and considered everything presented during the penalty phase, in memoranda, correspondence and subsequent hearings." He independently weighed the aggravation and mitigation and explained that the four statutory aggravating factors, which were proven beyond a reasonable doubt, substantially outweighed the three non-statutory mitigating factors. We find no error.

[9] Elledge next argues that the trial judge erroneously applied a presumption of death because, citing to *White v. State*, 403 So.2d 331 (Fla.1981), he stated "death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances." Although the language from *White* has been superseded in our recent cases,[7] we find that the trial court properly weighed the aggravating and mitigating circumstances.[8] We find no error.

[10] Elledge next asserts that the trial court misstated the testimony of defense expert Dr. Caddy concerning the "extreme mental or emotional disturbance" statutory mitigator:

> The Court finds the applicability of this mitigating circumstance was rebutted by the defendant's own expert. Dr. Caddy testified, based upon his examination of the defendant, interviews with family and friends, and, a review of the facts of this case, that it is his expert opinion was that the defendant was not under extreme mental or emotional disturbance when he committed the murder of Margaret Anne Strack.

We agree that the trial court misstated Dr. Caddy's views, which were that the mitigator applied to Elledge, but we find the error harmless in light of the court's reliance on Dr. Stock's conclusions:

> Dr. Stock concluded that the defendant did not suffer from fetal alcohol syndrome and found no indications of any organicity. Also, the defendant did not suffer from any mental illness, impulse control disorder, or post-traumatic stress disorder. Dr. Stock concluded that the defendant had an anti-social personality disorder. Dr. Stock testified that this is not a mental illness, but a life long history of a person who makes bad choices in life and that these choices are conscious and volitional.
>
> . . . .
>
> The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Margaret Anne Strack was committed. As such, the court finds that this mitigating circumstance does not apply.

On this record, we conclude beyond a reasonable doubt that the trial court's misstatement of Dr. Caddy's views did not affect the outcome. *See State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

Elledge next claims that the trial court failed to consider and find two proposed nonstatutory mitigators: 1) Elledge's history of drug and alcohol abuse and 2) mental health problems which do not rise to the level of statutory mitigation. We disagree. It is evident from the sentencing order that the trial court considered both proposed mitigators. The trial judge acknowledged that alcoholism influenced Elledge's life, and to the extent that his parents were alcoholic and he suffered the physical and mental abuse resulting from those circumstances, the court found nonstatutory mitigation. The judge rejected mental health problems as mitigation based on his findings that the statutory mitigators did not apply. The court found Dr. Stock credible when he testified that Elledge suffered no mental illness but had an anti-social personality disorder—meaning Elledge had a life-long history of making bad choices which were conscious and volitional. We find no error.

[11, 12] We likewise find that the trial court did not err in assigning "little weight" to child abuse as a nonstatutory mitigator. The "weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard:" *Blanco v. State*, 706 So.2d 7, 10 (Fla. 1997) (citing *Campbell v. State*, 571 So.2d 415, 420 (Fla.1990)). The trial court found that Elledge had a difficult and abusive childhood, but was influenced by testimony revealing that Elledge enjoyed a close relationship with his father:

> Both Danny Elledge and Connie Moffett described their father as a kind and wonderful man. Father Ken Roach, former Jacksonville detective, testified that after being apprehended, the defendant spoke by telephone with his father. He said the defendant was very open and emotional with his father during the telephone call.

The trial court did not abuse its discretion, "for we cannot say that no reasonable person would give this circumstance [little] weight in the calculus of this crime." *See id.*, 706 So.2d at 11 (citing *Huff v. State*, 569 So.2d 1247, 1249 (Fla.1990) ("[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court."). We find no error.

The remaining issues have already been decided adversely to Elledge[9] or are without merit.[10] Accordingly, the sentence of death is affirmed.

It is so ordered.

OVERTON, GRIMES, HARDING and WELLS, JJ., concur.

7. *See, e.g., Nibert v. State*, 574 So.2d 1059, 1063 (Fla.1990)("[T]his Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation.' ") (quoting *Songer v. State*, 544 So.2d 1010, 1011 (Fla.1989)).

8. In his order, the trial judge stated:

> In summary, the Court finds that there are four (4) aggravating circumstances applicable to this case which have been proven beyond and to the exclusion of every reasonable doubt.
>
> As to mitigation, the Court finds a lack of significant mitigating circumstances. The Court finds zero (0) statutory mitigating factors and three (3) non-statutory mitigating circumstances have been proven by a preponderance of the evidence, though entitled to little weight cumulatively.
>
> The minimal significance which attaches to the non-statutory mitigating circumstances does not approach the weight of overwhelming statutory aggravating factors which have been established.
>
> . . . .
>
> It is the opinion of this Court that the facts and circumstances of this case demand the imposition of the death penalty and that, in fact, the aggravating circumstances clearly and convincingly outweigh the mitigating circumstances so that no reasonable person could differ.

9. Issues 16, 23, 24, 25, 26, and 27.

10. Issues 8, 10, 11, 12, 13, and 19. Claim 9 (sustaining the prosecution's objection to the de-

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which SHAW, J., concurs.

ANSTEAD, Justice, concurring in part and dissenting in part.

While I agree with virtually all of the majority opinion and its conclusions, I do not agree that we can determine that the trial judge's explicit mistake of fact in his sentencing order concerning the nonexistence of a weighty statutory mental mitigator is "harmless error." We simply cannot say that there is *no* reasonable possibility that a trial court's misconception of the mental health testimony affected the trial court's weighing process in imposing the death sentence. The majority's analysis to the contrary is flawed in several regards.

In the usual case, the difficulty in applying a harmless error analysis is in determining whether there was a reasonable possibility that the trial adjudicator actually relied on the error in making a decision. Here we do not have that difficulty because the trial judge has explicitly told us in writing that he relied on his mistaken view of the expert's testimony in making his sentencing decision. In fact, we recently found harmful error in a virtually identical situation in *Larkins v. State*, 655 So.2d 95, 100 (Fla.1995):

> [T]he trial court concluded that Dr. Dee was not of the opinion that Larkins' condition was of such a nature that the defendant lacked the capacity to appreciate the criminality of his act or to conform his conduct to the requirements of law. In fact, Dr. Lee testified that Larkins' organic brain disorder "impairs his capacity to control that conduct whatever he appreciates it to be."

Id. at 100. Hence, contrary to the majority's analysis, the harmless error standard set out in *DiGuilio* cannot be met here, where the trial court explicitly relied on an incorrect view of mental health evidence as an important predicate to its conclusion that the death sentence should be imposed. This error can be corrected only by giving the trial court an opportunity to confront the mistake and then reconsider his analysis and conclusion in view of the mistake. Furthermore, the majority's analysis also makes the common mistake explicitly warned against in *DiGuilio* of simply looking to see if there is "some evidence," besides that erroneously relied upon to prop up the trial judge's conclusion. By quoting another expert's testimony as "some evidence" to support the judge's finding, the majority has directly violated the *DiGuilio* harmless error standard.

The mistake here is obviously substantial; it involves the nature of critical expert witness testimony about the existence of an important statutory mental mitigating circumstance. Moreover, the mistake is clear on the face of the sentencing order in erroneously stating that the expert's opinion was exactly opposite of that testified to at trial. Of course, if the judge's erroneous statement had been correct, i.e., that defendant's own expert actually gave important mental health testimony *against* the defendant, such an opinion would have been devastating to the defendant's position. It is one thing to have evidence offered against a defendant at trial; it is quite another to have the defendant's own witness offer evidence against him on the critical issue at trial, i.e., his state of mind at the time of the offense. The effect of such damaging testimony on a fact finder is obvious, and the trial court's mistaken notion that that is what happened in the penalty phase of this case cannot be characterized as "harmless."

In my view we should remand this case to give the trial court an opportunity to reevaluate the evidence and the mitigating factors based on an accurate view of the evidence. It is the trial court, not this Court, that is responsible for the sentencing order, and we should not substitute our view of what we would have done knowing the true facts. We simply cannot know whether the important mental mitigating factor in question here would have been found to exist based on a correct view of the expert testimony and whether the trial court's subsequent analysis and conclusion would have been the same. Because we cannot tell, we should remand this case to the trial judge, who can tell us.

SHAW, J., concurs.

Larry D. RICHARDSON, Appellant,

v.

STATE of Florida, Appellee.

No. 86011.

Supreme Court of Florida.

Jan. 29, 1998.

Defendant was convicted in the Circuit Court, Volusia County, Kim C. Hammond, J., after his third-jury trial, of first-degree murder and was sentenced to death. Defendant's motion to suppress confession was denied prior to first trial by Gayle Graziano, J., and successor judge Kim Hammond, J., stood by that ruling at the third trial. After the Circuit Court, Volusia County, Gayle S. Graziano, J., excluded collateral crimes evidence, state appealed and the Fifth District Court of Appeal, 621 So.2d 752, affirmed exclusion of evidence. Defendant appealed conviction and sentence. The Supreme Court held that: (1) confession was not admissible as it was given to police officer during plea negotiations, and (2) state could appeal trial court's exclusion of important circumstantial evidence that might have significantly impaired state's prosecution.

Reversed and remanded for new trial.

Wells, J., concurred in part and dissented in part and filed an opinion in which Harding, J., concurred.

1. Criminal Law ⇐408

In determining whether confession was given during plea negotiations, and thus is inadmissible at trial, first analysis is whether accused exhibited an actual, subjective expectation to negotiate a plea at time of the discussion, and second step is determining whether accused's expectation was reasonable given totality of the circumstances. West's F.S.A. § 90.410; West's F.S.A. RCrP Rule 3.172(h).

2. Criminal Law ⇐408

Defendant's confession was given during plea negotiations and thus was inadmissible at trial, as statement was given during process of repeated and ongoing plea negotiations, even though no agreement was ultimately reached; there was subjective expectation on defendant's part to negotiate a plea and a reasonable basis for that expectation based on state's desire to negotiate plea with repeated oral and written offers conditioned upon statement, and as quid pro quo defendant would give statement admitting murder and pending first-degree murder charge would be reduced. West's F.S.A. § 90.410; West's F.S.A. RCrP Rule 3.172(h).

3. Criminal Law ⇐408

In determining whether defendant's confession was given during plea negotiations and thus was inadmissible at trial, police officer that received confession was authorized to negotiate where he came to negotiations with written and signed agreement from state and entire purpose of officer's meeting with defendant was for continuing purpose of negotiating an agreement to get confession. West's F.S.A. § 90.410; West's F.S.A. RCrP Rule 3.172(h).

4. Criminal Law ⇐408

In determining whether defendant's confession was given during plea negotiations and thus was inadmissible at trial, plea negotiations had not ended when, because defendant objected to some terms of written agreement presented by state, no final agreement was concluded on day in question; officer was negotiating to secure statement, defendant repeatedly and consistently actively sought to negotiate plea agreement pro se, and parties were close to agreement. West's F.S.A. § 90.410; West's F.S.A. RCrP Rule 3.172(h).

APPENDIX D

Petitioner's Motion to Preclude Death Penalty

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,	)	Case No. 75-000087CF
vs.	)	Judge: GREENE
WILLIAM D. ELLEDGE,	)	
Defendant.	)	
	)	

MOTION TO AVOID SEEKING THE DEATH PENALTY

COMES NOW the Defendant, William Duane Elledge, by and through his undersigned attorneys, and hereby requests this Court to order that the State Attorney cannot seek the death penalty in this case because it is cruel and unusual punishment and violates the eighth and fourteenth amendments to the United States Constitution.

In support of this motion the Defendant states as follows;

I. History

On March 18, 1975, William Duane Elledge was sentenced to death for the murder and rape of Margaret Anne Strack. On April 7, 1977, the Florida Supreme Court reversed the first death sentence. On August 2, 1977, he was resentenced to death. On July 20, 1987, the Eleventh Circuit Court of Appeals ordered that Mr. Elledge be resentenced. On August 28, 1989, he was resentenced to death. On January 14, 1993, the Florida Supreme Court reversed for a new sentencing hearing. Not one of the three errors calling for the subsequent reversals was the fault of William Duane Elledge. It

has been nearly 19 years since Margaret Anne Strack was killed, and Elledge was sent to death row.

II. Argument

Seeking the death penalty in this case violates the Eighth Amendment to the United States Constitution. The extraordinary length of time in which William Elledge has been held on death row constitutes cruel and unusual punishment in and of itself.

A unanimous decision of the European Court of Human Rights in the Soering case, No. 1/1989/161/210 (Strasbourg, July 7, 1989) provides unusual and significant support for the argument that the extraordinary length of time in which William Elledge has been held on death row, followed by an execution, would constitute cruel and unusual punishment. In Soering, the European Court held that extradition to the United States for a capital offense would violate Article III of the European Convention on Human Rights, which prohibits " inhuman or degrading treatment or punishment". The European Court based this in large part on "the very long time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and the personal circumstances of the applicant,..." Paragraph 111.

The court based that conclusion on a finding that, in the average case, "before being executed, condemned prisoners in Virginia spent an average of 6-8 years on death row, enduring anguish and mounting tension..." Id. at Paragraph 111. It recognized "that the machinery of justice [which causes this]... is

itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial." Id. at Paragraph 111. It also noted that the death penalty itself is not prohibited by that convention. Id. at Paragraph 101. But it nonetheless held that the additional suffering caused by long periods of pre-execution confinement could not be tolerated under the European Convention's guarantee of human rights, and the civilized standards it incorporates.

William Duane Elledge has now spent nearly three times the average length of time awaiting execution found to be "inhumane or degrading" in Soering.

For nearly 19 years, through no fault of his own, William Elledge has fought to maintain his sanity and sense of humanity in an environment maintained specifically for the purpose of deteriorating the inmates sense of hope. He was sent to prison to suffer and the state has been successful. This environment has blatantly ignored the fact that William Elledge is a living, breathing human being. Nothing could be more cruel. William Elledge initiated this entire ordeal by the commission of a crime, but played no part in the three subsequent errors leading to reversals by the higher courts.

The conditions in which William Elledge has been kept have exacerbated the inherently cruel, inhuman and degrading experience

of being under sentence of death. William Elledge has managed to grow as a human being instead of deteriorate in this bleak environment which, through no fault of his own, he has been subjected to for nearly 19 years. William Elledge's ability to trust in or care about other human beings has added to the pain he has suffered when those who he was close to were led off to their death.

William Elledge has paid for his crimes by nearly 19 years of imprisonment under the threat of death: and he faces imprisonment for the rest of his life, whatever the outcome of these proceedings. The question here is how much more can be constitutionally extracted from him for his offense.

The people of Florida have not, through their legislature, declared that the punishment for these or any crimes should be incarceration for nearly 19 years, in the shadow of death, ending with the extinction of a life. William Elledge has had long years to change and rebuild. No legislature has ever prescribed such a punishment; if it did, surely the eighth amendment would forbid it. This kind of treatment of human beings is unknown in our history. Cf.In Re: Medley, 134 U.S. 160, 171 (1890) wherein the court referred to a period of a few weeks in solitary confinement awaiting execution, with limitations on visitation, as an "additional punishment of the most important and painful character...".

William Elledge has been subjected to prolonged isolation and enforced idleness, which has added to the torment existing within

the bleak quality of life on death row. This bleak quality of life reflects the common goal: human storage. This goal dictates that condemned prisoners be treated essentially as bodies kept alive to be killed. This concern for preserving bodies without regard for the quality of human life amounts to treating the person like a piece of meat. Robert Johnson, Death Work, A Study of the Modern Execution Process (Calif.: Brooks/Cole Pub. Co. 1990), 49. William Elledge has been warehoused for death nearly 19 years now.

Long hours in the cell are a source of psychological pressure and emotional turmoil. All prisoners experience some pressure; for William Elledge, it has been unrelenting, as the state has attempted over and over again to kill him without properly succeeding. Even in light of our age old American pastime of baseball: you get three strikes and then you are out.

Even in the best of " death row" conditions, prolonged waiting for execution must add to the suffering of those sentenced to death. As the United Nations Special Rapporteur on torture observed in his 1988 report to the UN Commission on Human Rights, if "persons who have been sentenced to death have to wait for long periods before they know whether the sentence will be carried out or not" and " if the uncertainty...lasts several years... the psychological effect may be equated with severe mental suffering, often resulting in serious physical complaints... it may be asked whether such a situation is reconcilable with the required respect for man's dignity and physical and mental integrity." Amnesty International, When the State Kills....; The Death Penalty: A

Human Rights Issue, (Amnesty International Publications 1989).

In the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly in 1984, torture is defined as " severe pain or suffering, whether physical or mental", inflicted by or with the acquiescence of a public official for certain specified purposes. The death penalty has been called a form of torture. William Elledge has fashioned himself to become a productive member of the general prison environment, he has suffered enough and used this suffering to grow as a human being rather than decay like a piece of meat during this 19 year delay. This prolonged delay arose from factors outside the control of the condemned man and would render a decision to carry out the sentence of death an inhuman and degrading punishment after nearly 19 years of being warehoused while the state attempted to get it right.

To add execution by electrocution to the penalty William Elledge has already suffered, cannot " comport with the fundamental human dignity that the eighth amendment protects." Ford v. Wainwright, 106 S.Ct. 2595,2600 (1986).

Wherefore, the Defendant request this honorable Court to grant this motion, and to grant him such other, further relief as the Court shall deem just and proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to the Office of the State Attorney,

Broward County Courthouse, Fort Lauderdale, Florida, this_____ day of July, 1993.

ALAN H. SCHREIBER
Public Defender
17th Judicial Circuit

WILLIAM T. LASWELL, #142842
Assistant Public Defender
Attorney for Defendant

WILLIAM D. ELLEDGE
Broward County Jail
8-C-1

APPENDIX E

Transcript of Evidentiary Hearing on
Motion to Preclude Death Penalty

THE COURT: If the State is ready to argue the motion, that's fine. It's up to you.

MR. LASWELL: Just to make sure, you know, I'm not asking for this, Judge. I'm not trying to sandbag anybody. I just wanted to file them and let everybody know that they were on file. If the State feels comfortable and wants to do it, you know, that's fine with me. I'm not trying to ambush anybody.

MS. McCANN: Your Honor, the State is familiar with this motion because it was filed almost identically in the last sentencing phase which occurred in 1989.

But the first argument the State would like to make is that there is no statute of limitations of first degree murder so there can be no preclusion of the death penalty due to delay.

The second argument is that I'm sure this Court is aware of the State v. Bloom and State v. Donner decision of the Florida Supreme Court. They were asked to make a pretrial and presentencing determination if death was the appropriate penalty. The Florida Supreme Court upon writ of prohibition by the State of Florida ruled that the Circuit Court did not have jurisdiction to make a presentencing determination if death was the appropriate penalty where the Defendant stood convicted of first degree murder.

APPENDIX H

Trial Judge's Sentencing Order

a German national from UK to Virginia to face capital murder charges because of anticipated time that they would have to spend on death row if sentenced to death); Vatheeswaran v. State of Tamail Nadu, 2 S.C.R. 348, 353 (India 1983) (criticizing the "dehumanizing character of the delay" in carrying out an execution); Sher Singh et al. v. The State of Punjab, 2 S.C.R. 582 (India 1983) ("Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed."); Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimb. June 24, 1993) (reported in 14 Hum. Rts.L.J. 323 (1993)).

Similar views have been expressed by legal commentators and mental health experts. See e.g. Schabas, EXECUTION DELAYED, EXECUTION DENIED, 5 Crim. L. Forum 180 (1994) [available on WESTLAW]; Lambrix, THE ISOLATION OF DEATH ROW in Facing the Death Penalty 198 (M. Radelet ed. 1989); Millemann, CAPITAL POST-CONVICTION PRISONERS' RIGHT TO COUNSEL, 48 Md.L.Rev. 455, 499-500 (1989) ("There is little doubt that the consciousness of impending death can be immobilizing.... This opinion has been widely shared by [jurists], prison wardens, psychiatrists psychologists, and writers.") (citing authorities); Mello, *Facing Death Alone*, 37 AMER. L. REV. 35, 37-39 (1986) ("The physical and psychological pressure besetting capital inmates has been widely noted.... Courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an eighth amendment violation in itself or is an element making the death penalty cruel and un usual punishment.") (citing authorities).

The recent landmark decision rendered by the Judicial Committee of the Privy Counsel of the United Kingdom (the "Privy Council"),

involves a similar case. Pratt & Morgan v. The Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993, 3 WLR 995, 143 NLJ 1639, 2 AC 1, 4 All ER 769 (Nov. 2 1993) (en banc) (available on LEXIS).nI Pratt, an appeal by two condemned men on Jamaica's death row, the Privy Council, sitting *en banc* for the first time in five decades, unanimously held that carrying out the death sentences of the two men would be "torture," and "inhuman" and "degrading" punishment. The Privy Council did not hold that capital punishment was cruel and unusual *per se*, but instead focused on the fact that the condemned men had been on death row for a protracted period of time (fourteen years). The Privy Council stated:

> There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

Id. at 16. The reasoning of Pratt & Morgan, supra, controls this case. British common law is the basis of our legal system. The delay in this case is clearly cruel and unusual under the Eighth Amendment.

In Tillman v. State, 591 So. 2d 167 (Fla. 1991), this Court noted that Article I, Section 17 of the Florida Constitution prohibits "cruel and unusual punishment." Id. at 169. This Court held that a death sentence violates this provision if it is "unusual." This case clearly is. As the trial court found:

> Clearly, the legal history of this case is unprecedented.

R3767.

Of thirty-six (36) people executed under Florida's current statute, none has been on death row as long as Mr. Elledge has. Appendix. The delay in carrying out this execution violates both the Florida and United States Constitutions. A reduction to life is required.

APPENDIX H

Trial Judge's Sentencing Order

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO.: 75-87CF10A

JUDGE: CHARLES M. GREENE

STATE OF FLORIDA,
Plaintiff,

vs.

WILLIAM DUANE ELLEDGE,
Defendant.
_____/

Filed In Open Court,
ROBERT E. LOCKWOOD,
CLERK
ON FEB 0 4 1994
BY

ORDER

THIS CAUSE comes before the Court pursuant to the mandate of the Florida Supreme Court. In prior proceedings on March 17, 1975, the defendant entered a plea of guilty to Murder in the First Degree and Rape. On November 1, 1993, a jury of twelve (12) members of the community were impaneled to make an advisory recommendation of sentence to this Court. At the conclusion of the penalty phase proceedings on November 19, 1993, the jury recommended that the defendant be sentenced to death for the murder of Margaret Anne Strack by a vote of nine (9) to three (3).

On November 19, 1993, the Court requested sentencing memoranda from counsel for the state and counsel for the defendant. The Court reviewed these memoranda and numerous letters written on behalf of the defendant. The Court also heard evidence, and afforded the defense an additional opportunity to present further evidence and argument on January 28, 1994, before retiring to consider sentence.

Accordingly, this Court, having heard evidence presented during the penalty phase proceedings, having had the benefit of

PUBLISHER'S NOTE:

Page number(s) 2 could not be located.

The court finds that the applicability of this aggravating factor is proven beyond a reasonable doubt.

2. The capital felony was committed while the defendant was engaged in the commission of or attempt to commit, or escape after committing a rape (sexual battery). F.S. 921.141(5)(d).

The defendant was charged, plead guilty to and was convicted of raping Margaret Anne Strack, the victim of the homicide. The physical evidence presented and the defendant's own confession proves beyond a reasonable doubt that the instant first degree murder was committed during the commission of the rape of Margaret Anne Strack. He admitted to strangling the victim when she rejected his sexual advances. The defendant told Ms. Strack that he was going to have sex with her, whether she wanted to or not. He then proceeded to rape the victim while he strangled her to death.

The court finds the applicability of this aggravating circumstance is proven beyond a reasonable doubt.

3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. F.S. 921.141(5)(e).

The evidence establishes clear proof that the defendant's dominant motive was the elimination of a witness. Riley v. State, 366 So.2d 19 (Fla. 1978); Menendez v. State, 368 So.2d 1278 (Fla.

1979). The defendant attempted to have sexual intercourse with Margaret Anne Strack and she resisted his advances. The defendant then grabbed her by the throat and began choking her. At that time, Ms. Strack relented and the defendant dropped his pants to his ankles and mounted her. The victim then said "no" and screamed that she was going to tell the police. It was at this point, the defendant, by his own statement, grabbed her throat choking off her screams and raped her. The Court finds the facts of the case at bar are distinguishable from those in Doyle v. State, 460 So.2d 353 (Fla. 1984), where the trial court merely assumed that the victim would have reported her rape to the police because she knew the defendant.

Further evidence of the defendant's motive to eliminate Margaret Strack is the fact that police action would not have just been limited to the allegations of rape. The defendant testified in a hearing before the Court on January 28, 1994, that at the time of this incident, he believed there was a warrant for his arrest for violation of his Colorado probation for the charge of menacing. Also, a few weeks prior to the Strack murder, he testified he had failed to appear in court for charges in Missouri.

The evidence presented sufficiently establishes that the defendant strangled Margaret Anne Strack to her death in order to prevent her from being able to report the rape to the police, which would have also put in motion the police discovery of his out-of-state warrants.

The Court finds that the state has proven the applicability of

this aggravating circumstance beyond a reasonable doubt.

4. The capital felony was especially heinous, atrocious or cruel. F.S. 921.141(5)(h).

The defendant's own statement proves that the strangulation of Margaret Anne Strack continued for approximately fifteen (15) minutes. The evidence established that after the victim threatened to tell the police that the defendant had or attempted to rape her, he grabbed her by the throat and choked her to death, while at the same time sexually forcing himself on her. The defendant's statement and the testimony of the medical examiner, Dr. Fatteh, clearly established that the victim fought in vain for her life.

She struggled against the defendant, fought for air and hit the walls with her arms. The defendant then pulled her off the bed and onto the floor, where he continued choking her with both hands until she was dead. Dr. Fatteh testified that Margaret Anne Strack's cause of death was asphyxiation due to strangulation. He testified that she would have lost consciousness within one (1) to two (2) minutes of the choking.

The defendant's statement, however, suggests that her struggle for life may have lasted even longer as he raped and choked her for approximately fifteen (15) minutes. It was only after she turned purple, her eyes rolled into the back of her head, she stopped struggling, and gave a last short gasp for air, that he released his strangle hold on her.

The facts of the instant case are analogous to those of Sochor

v. State, 619 So.2d 285 (Fla. 1993) with respect to this issue. The defendant in Sochor also confessed to choking his victim to death. In finding the aggravating factor of heinous, atrocious or cruel, the court stated that, "[I]t can be inferred that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinous is applicable". (Citations omitted).

The Court finds that the state has clearly proven, beyond a reasonable doubt, that Margaret Anne Strack's death was committed in an especially heinous, atrocious or cruel manner. Therefore, this aggravating circumstance is applicable.

None of the other aggravating factors enumerated by statute are applicable nor were considered by the Court in this case.

B. MITIGATING CIRCUMSTANCES

The defendant presented evidence of mitigation at the penalty phase proceedings, in his sentencing memorandum and during a hearing before this Court on January 28, 1994, subsequent to the jury's advisory recommendation. The defendant has requested the Court to consider and find that the following statutory and non-statutory mitigating circumstances have been established by a preponderance of the evidence:

Statutory Mitigating Circumstances:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. F.S. 921.141(6)(b).

The Court has given lengthy consideration to the defendant's childhood which constitutes the underlying factual basis for his argument regarding the applicability of this statutory mitigating circumstance.

Three psychologists testified during the penalty phase proceedings. Two, Doctors Schwartz and Caddy, were called by the defendant and one, Dr. Stock, was called in rebuttal by the state. These doctors differed significantly as to the extent and even the existence of extreme mental or emotional disturbance of the defendant at the time of the commission of the capital felony.

Dr. Gary Schwartz is not a Board Certified Psychologist and stated that he testifies almost exclusively for the defense bar. He met with the defendant in September of 1993. Dr. Schwartz performed many psychological tests over several days. He spent approximately twenty (20) hours reviewing reports and tests of other doctors who previously examined the defendant, such as Dr. Lewis and the doctors at the Florida State Prison System. Dr. Schwartz also reviewed depositions, previous penalty phase transcripts, the defendant's Army, Colorado State Hospital and California Youth Authority records. Based upon the above, he made the following findings:

The defendant's early childhood consisted of severe emotional and psychological abuse. The defendant's parents were alcoholics and very poor. Based upon information gathered from interviews, Dr. Schwartz concluded that the defendant's mother consumed alcohol during her pregnancy, which made the defendant a "Blue Baby"

(oxygen deprived and underweight). During the defendant's teenage years, he consumed alcohol and drugs. The family moved frequently. The defendant did poorly in school. He had problems with both fellow students and teachers. The defendant's sexual development was not normal because, according to Dr. Schwartz, the defendant had sex with his sister Connie Moffett during his teenage years.

As to this last point, this fact was never established by any testimony, even though both Ms. Moffett and the defendant's brother Danny Elledge testified. In fact, during prior court proceedings, the defendant's sister denied having sex with her brother, William Duane Elledge. Further, during the defendant's prior testimony, he never stated that he had sex with his sister.

Based upon the tests Dr. Schwartz administered to the defendant, he opined that the defendant suffered from a lack of impulse control and mild to moderate organic brain disorder.

Dr. Schwartz's credibility was diminished during cross-examination and as a result of the testimony of Dr. Caddy, the defendant's other witness. On cross-examination, Dr. Schwartz agreed that the defendant's behavior during the rape and murder of Margaret Anne Strack indicated that the defendant exercised control during the homicide and that he knew the difference between right and wrong. Specifically, when the victim relented and stated that she would have sex with him, the defendant stopped choking her and pulled down his pants. Later, when she attempted to resist him when he continued to rape and strangle her, he pulled her off the bed to stop her from making noise.

Throughout the defendant's life at liberty, it is obvious from the evidence that defendant refused to adhere to authority. While in the Army, he went AWOL and was discharged. While in the Army a neurological examination on the defendant indicated he was functioning within normal range. This is consistent with the results of the neurological and MRI performed in 1993. When confronted on cross-examination with these facts, Dr. Schwartz receded from his initial opinion and admitted that only minor organic problems were possible.

Dr. Schwartz stated that, although the defendant was not delusional at the time of the offense, had he not drunk alcohol or used drugs, the rape and murder of Margaret Anne Strack would not have occurred. The Court finds that this opinion is contrary to the other evidence presented. Janet Pocis, the bartender, testified that the defendant was sober. Also, the defendant's behavior subsequent to the murder, as well as his later meticulous recollection of the details of the crimes he committed, belies the doctor's conclusion.

Dr. Glen Caddy, the other defense expert, is also not a Board Certified Psychologist. He performed a comprehensive examination of the defendant in 1989 and re-examined him again in 1993. Dr. Caddy interviewed the defendant's sister, brother, wife and aunt. He also reviewed the California Youth Authority records. He disagreed with Dr. Schwartz on many points. He testified that he found no evidence of any organic brain disorder and even if organicity existed to some degree, it did not play a part in the

behavior which lead to the murder of Margaret Anne Strack. He further testified that the defendant did not suffer from fetal alcohol syndrome or post-traumatic stress disorder. These findings directly contradict Dr. Schwartz's conclusions.

Dr. Caddy testified that the murder of Margaret Anne Strack was a result of a "rage reaction". However, this conclusion was negated somewhat when Dr. Caddy admitted that the defendant had exercised control during various moments of the rape and strangulation of Ms. Strack, as well as during the murders of both Mr. Gaffney and Mr. Nelson. During cross-examination, Dr. Caddy admitted that the defendant's behavior, stopping Ms. Strack from making noise and temporarily ceasing to choke her when she relented and agreed to have sex with him, was evidence of the defendant's ability to exercise control over his actions. The Court finds that these admissions regarding control are inconsistent with a diagnosis of "rage reaction".

Dr. Caddy stated that the defendant was violent and difficult to control once provoked. On cross-examination, Dr. Caddy was able to indicate instances where the defendant was able to keep violence in check. Dr. Caddy also stated that it was fortunate that the defendant had not killed previously. This also exhibits the ability to exercise control over one's own actions.

Dr. Caddy's testimony with respect to his diagnosis of "rage reaction" was further minimized by his answers when asked, if he could think of any previous situation when the defendant's impulse control disorder was stronger than the defendant's will. The

doctor admitted he could not. The following two prior situations of which Dr. Caddy testified, clearly established that the defendant had previously exercised control over his impulses and kept his violence in check. They were: 1) When a customer gave him a difficult time, he threw an egg at the customer instead of using the meat clever he had possession of, and 2) During the commission of the Colorado menacing offense, he fired a gun into the air instead of at the taxi driver.

As a result, the Court finds that an inability to control rage has not been established.

After interviewing the defendant's family members, Connie Moffett, Danny Elledge, Janice Nelson Elledge and Aunt Ruby Sparks, Dr. Caddy found that the defendant's mother's abusive behavior was distributed throughout the family. Until he ran away from home, the defendant was the focus of that abuse. After the defendant left home, his mother shifted her abusive behavior to brother Danny, who today and in the past, has behaved normally.

Dr. Harley Stock, the state's rebuttal expert, is a Board Certified Forensic Psychologist. He spent approximately twenty five (25) hours reviewing the transcripts of the proceedings dating from 1974, depositions and reports of doctors. He listened to the tape of the defendant's confession. He reviewed police reports and the defendant's records from the Army, California Youth Authority, Colorado State Hospital and the Florida Department of Corrections.

After the state rested its case in chief, Dr. Stock also spent fourteen (14) hours interviewing the defendant and administering

the Minnesota Multi-Phasic Personality Inventory Revised test (MMPI-2) and Clinical Analysis questions. Dr. Stock found that the defendant was malingering, which gave rise to a deceptive result on the MMPI-2. The doctor testified that the defendant's average IQ rules out retardation, which is a primary indicator of fetal alcohol syndrome. Also, contrary to Dr. Schwartz's findings and consistent with Dr. Caddy's, Dr. Stock concluded that the defendant did not suffer from fetal alcohol syndrome and found no indications of any organicity. Also, the defendant did not suffer from any mental illness, impulse control disorder, or post-traumatic stress disorder. Dr. Stock concluded that the defendant had an anti-social personality disorder. Dr. Stock testified that this is not a mental illness, but a life long history of a person who makes bad choices in life and that these choices are conscious and volitional.

The Court finds the applicability of this mitigating circumstance was rebutted by the defendant's own expert. Dr. Caddy testified, based upon his examination of the defendant, interviews with family and friends, and, a review of the facts of this case, that it is his expert opinion was that the defendant was not under extreme mental or emotional disturbance when he committed the murder of Margaret Anne Strack.

The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Margaret Anne Strack was committed. As such, the court finds that this

mitigating circumstance does not apply. See Nibert v. State, 574 So.2d 1059 (Fla. 1990), rehearing denied; Duncan v. State, 619 So.2d 279 (Fla. 1993).

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. F.S. 921.141(6)(f).

The evidence indicated that the defendant was not impaired by alcohol or drugs during the commission of the murder of Margaret Anne Strack. Janet Pocis, the bartender who served the defendant just before the murder of Ms. Strack, testified that the defendant was sober when he left the bar with his victim.

The facts establish that the defendant was in control during the murder and rape of Margaret Anne Strack. He stopped choking her when she said "okay", she would allow him to have sex with her as she had surrendered to his aggression. He then pulled his pants down and mounted her. He began to choke her again when she said she would tell the police of the rape. He pulled her off the bed when she made noise and, after her death moved her into the bathroom to clean off her bloody nose. The defendant then waited until dark and disposed of her body in an orderly fashion.

Dr. Schwartz testified that based upon his testing, the defendant's full scale IQ is one hundred and three (103) points. Dr. Caddy testified that the defendant's IQ was in the normal range.

The facts of this case and the defendant's own confession

establish that the defendant could appreciate the criminality of his conduct and that he possessed the ability to conform his conduct to the requirements of the law. See State v. Dixon, 283 So.2d 1 (Fla. 1973). The Court finds that this mitigating circumstance has not been proven by a preponderance of the evidence and does not apply.

The Court finds that none of the statutory mitigating circumstances listed in F.S. 921.141(6) have been proven by a preponderance of the evidence. Therefore, none apply.

Non-statutory Mitigating Circumstances:

The defendant has asked the court to consider the following non-statutory mitigating circumstances:

1. Family background.

The court recognizes that the defendant was raised under difficult circumstances. The defendant's mother and father were alcoholics. His mother inflicted physical abuse upon her children. The defendant and his siblings were the targets of her anger as well as her excessive and abusive discipline. The defendant's parents were poor and moved frequently.

The abuse the defendant received was no different from that of his siblings. The defendant was not singled out as the only target of his mother's behavior. The defendant's brother, Danny Elledge, testified that there was no difference in the way the defendant, his sister Connie Moffett, nor he were treated and beaten by their mother. Ms. Moffett confirmed this fact when she testified stating that she was also beaten by their mother.

While the defendant's childhood was less than ideal, the same childhood experiences had no criminal effect on the defendant's siblings. Both Danny Elledge and Connie Moffett have lead productive, law-abiding lives and raised families without having committed one murder, let alone three. The defense has suggested that the defendant had sexual encounters with his sister Connie as a teen, although this fact has not been proven. The defendant's brother, Danny Elledge, testified only as to his own sexual activity with his sister. The Court notes that this would be a similar experience to that alleged by the defendant. Danny Elledge's adolescent sexual experience has not prevented him from leading a law abiding and productive life, rendering the defendant's claim, even if proven, irrelevant.

The defendant urges this Court to find that he was unable to bond with his father as a child. The testimony, however, revealed that the defendant, even after leaving home, enjoyed a close relationship with his father. Both Danny Elledge and Connie Moffett described their father as a kind and wonderful man. Father Ken Roach, former Jacksonville detective, testified that after being apprehended, the defendant spoke by telephone with his father. He said the defendant was very open and emotional with his father during the telephone call.

The Court finds it has been established that the defendant had a difficult and abusive childhood by a preponderance of the evidence. However, this factor is given little weight by the Court.

2. Remorse, Cooperation and Confession.

The evidence establishes that after his apprehension in Jacksonville, Florida, for the murder of Mr. Nelson, the defendant did ultimately make a complete confession to the three murders previously mentioned. However, the facts clearly indicate that the defendant did not voluntarily come forward to cooperate and confess to the murder of Margaret Anne Strack. To the contrary, he disposed of her body, fled the area in her car and committed two more homicides before being arrested.

According to the former detective, Father Roach, the defendant was initially noncommittal to the police. He would not admit his guilt and denied any culpability. It was only after the defendant was taken out of the holding cell for the fourth time that he confessed to the murder of Margaret Anne Strack and Edward Gaffney in Broward County and to the murder of Paul Nelson in Duval County. The defendant confessed because he was caught.

The Court finds that there was minimal cooperation and, giving the defendant the benefit of the doubt, the Court finds that this non-statutory mitigating factor has marginally been established by a preponderance of the evidence and is worthy of slight weight.

The defendant claims that he showed remorse for the murder of Margaret Anne Strack. This contention is simply not supported by the evidence. Former detective, Father Roach, testified that the defendant while confessing, cleansed his soul and was very remorseful. This is not supported by the other evidence.

The facts establish that the defendant showed no remorse after

murdering Margaret Anne Strack. He dragged her body to her car, drove to a parking lot and dumped her body. He kept the car and picked up a hitchhiker. The defendant's statement indicated that, with this hitchhiker, he intended to commit some other act involving his gun, which never took place.

A short time later, he broke into a Pantry Pride grocery store where he murdered the night janitor, Edward Gaffney. The defendant ate and drank before stealing money from a charity collection box. He fled Broward County and took the bus to Jacksonville, Florida. Once there, he terrorized the Nelson family before murdering Paul Nelson. He then attempted to flee the Jacksonville area and was arrested at the Jacksonville bus station.

While several of the defendant's witnesses have testified as to his remorse, the Court had the opportunity during the penalty phase proceedings to hear the taped confessions of the defendant. Mr. Elledge's cold and matter-of-fact recollection of the murder of each of his victims, does not reflect even the slightest iota of remorse. To the contrary, the defendant blames the death of each victim on either society or the victim's own actions, taking no accountability for his own deeds.

The Court finds that the defendant has not demonstrated any remorse for the murder of Margaret Anne Strack, thereby failing to establish this mitigating circumstance by a preponderance of the evidence.

3. Post-Conviction Life.

The defendant has been incarcerated since late 1974 and has

spent the majority of that time as an inmate on Death Row. During the proceedings before this Court, several prison guards testified that the defendant was obedient while incarcerated.

For the most part, however, these prison guards were unaware of the fact that the defendant had accumulated nineteen (19) disciplinary reports and authored threatening letters while on Death Row. The guards who stated that they were familiar with the defendant's disciplinary reports, did not know the substance of them. Those who did know, admitted that the reports were "not good".

The Court finds that the defendant failed to present evidence which establishes, by a preponderance of the evidence, that he is a particularly well behaved prisoner.

Several individuals testified on behalf of the defendant and labeled him a friend and provider of support. Indeed, during the instant penalty phase proceedings, the defendant married a pen pal and occasional Death Row visitor. While the defendant may be a good friend, husband and step-father, these qualities are no more than what society expects from all of us. Zeigler v. State, 580 So.2d 127 (Fla. 1991).

Therefore, even though established by a preponderance of the evidence, this Court finds that this non-statutory mitigating factor is entitled to very little weight.

The defendant argues that he will function well within the confines of the prison system's general population. To establish this mitigating circumstance the defendant offers evidence of self

improvement (acquiring his GED and entrance into a paralegal program) while on Death Row and argues that this proves he presents no risk of danger to himself or others.

The Court finds that evidence to the contrary was proven during the penalty phase proceedings. While on Death Row, the most restrictive and confined environment in the state prison system, the defendant received nineteen (19) disciplinary reports and wrote several threatening letters.

The applicability of this proposed mitigating circumstance has additionally been refuted by the defendant's own admission in court. The defendant admitted that he still has the same problems "inside" now as he did at the time of the murders.

The Court finds that this mitigating circumstance has not been established by a preponderance of the evidence and will not be considered by the Court in its weighing process.

4. Delay, An Unusual Mitigating Factor.

The defendant has presented additional evidence with respect to this factor in a hearing before this Court on January 28, 1994, subsequent to the jury's recommendation. The essence of this argument was that due to the passage of time, there was difficulty locating and presenting evidence to establish mitigation.

Philip Charlesworth, Chief Investigator for the Public Defender's Office testified as to the efforts and difficulties encountered in searching for the defendant's past. Assisting him in the investigation were three investigators from his office, investigators from two different out-of-state public defenders'

offices and a private investigator. He and his own investigators travelled many times to other states and found that information regarding the defendant's background was hard to gather.

The passage of time has obviously played a role in the defendant's difficulties of finding his past in search of evidence of mitigation. However, the Court finds these difficulties are primarily due to the defendant's lifestyle prior to his 1974 arrest in Florida. A contemporaneous search in 1975 would have been virtually as difficult as it was in 1993. The defendant was a drifter, his family moved from place to place, school to school without establishing strong ties to any community. Also, the defendant testified that he never held a job for more than a week or two. Testimony from a former employer, employees, school friends and neighbors would be essentially meaningless and impossible to obtain then and now.

Clearly, the legal history of this case is unprecedented. Since the commission of the murder of Margaret Anne Strack, the defendant has, prior to this proceeding, on three occasions been sentenced to death. He has spent the majority of the last nineteen (19) years confined on Florida's Death Row. During the last nineteen (19) years, many of the defendant's relatives have died. Due to his incarceration, the defendant claims he has not had the opportunity to demonstrate to the Court his rehabilitation as he has not been part of a free society.

However, this is due to the fact that he was under a sentence of death for the murder of Margaret Anne Strack, to which he

entered a plea of guilty in 1975. There is no statute of limitations for the crime of murder in the first degree. F.S., section 775.15(1). Additionally, the time delay between the offense and the imposition of sentence does not negate or diminish the conviction for purposes of a capital sentencing proceeding. Melendez v. State, 498 So.2d 1258 (Fla. 1986).

Although it is an interesting issue, more appropriately raised in another forum, the fact that the defendant has served nineteen (19) years on Death Row plays no part in these proceedings and is not a mitigating circumstance. The Court was ordered by mandate to conduct and preside over a new sentencing phase proceeding. The reason for imposing sentence on this defendant in 1994, is no different than the reason for imposition of sentence in 1975: The defendant committed the brutal rape and murder of Margaret Anne Strack in 1974.

This Court heard, reviewed and considered everything presented during the penalty phase, in memoranda, correspondence and subsequent hearings.

In summary, the Court finds that there are four (4) aggravating circumstances applicable to this case which have been proven beyond and to the exclusion of every reasonable doubt.

As to mitigation, the Court finds a lack of significant mitigating circumstances. The Court finds zero (0) statutory mitigating factors and three (3) non-statutory mitigating circumstances have been proven by a preponderance of the evidence, though entitled to little weight cumulatively.

The minimal significance which attaches to the non-statutory mitigating circumstances does not approach the weight of overwhelming statutory aggravating factors which have been established.

The jury recommended that this Court impose the death penalty upon WILLIAM DUANE ELLEDGE by a majority vote of nine (9) to three (3). This recommendation must be afforded great weight by this Court in its ultimate sentencing. Tedder v. State, 322 So.2d 908 (Fla. 1975). Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances. White v. State, 403 So.2d 331 (Fla. 1981).

It is the opinion of this Court that the facts and circumstances of this case demand the imposition of the death penalty and that, in fact, the aggravating circumstances clearly and convincingly outweigh the mitigating circumstances so that no reasonable person could differ.

It is, therefore, the sentence of this Court as to Count I, Murder in the First Degree, that you WILLIAM DUANE ELLEDGE be sentenced to death for the murder of MARGARET ANNE STRACK.

It is further ordered that you WILLIAM DUANE ELLEDGE be confined by the Department of Corrections and be kept in close confinement until the date of your execution and on that day you shall be put to death by electrocution which is the manner provided by law.

It is further ordered that you, WILLIAM DUANE ELLEDGE are

hereby notified that you have thirty (30) days from this date within which to appeal the sentence of this Court. The sentence of death is subject to automatic review by the Supreme Court of Florida. The Office of the Public Defender is hereby appointed to assist you as counsel in the filing and preparation of your appeal.

DONE AND ORDERED in Open Court, Broward County Courthouse, Fort Lauderdale, Florida, this 4th day of February, 1994.

CHARLES M. GREENE,
CIRCUIT COURT JUDGE

cc: Michael J. Satz, State Attorney
William T. Laswell, Asst. Public Defender
William Duane Elledge, Defendant.

APPENDIX I

Section of Petitioner's Brief Dealing With Trial Court's Reliance on False Information

jeans R1234-1235. She then went to the bathroom and came out with her panties off of one leg and around her knee on the other R1235. She came back and rubbed her breasts against him and her vagina against his penis R1236. He began to massage her R1236. She was not wearing a bra R1236. He then inserted his finger in her vagina R1237. For the first time, she said she did not want to do anything R1237. He "couldn't hold himself back." R1237. He grabbed her and got on top of her R1238. She dug her fingernails in his wrist R1238-1239. She said, "Okay, okay" and he dropped his pants R1239. She then refused to have sex and began to scream R1240. He grabbed her throat and choked off her screams R1240. He inserted his penis and she kept struggling R1240-1242. She went limp and he realized she was dead R1242-1243. This was all of the State's testimony concerning this homicide.

These facts clearly support the trial court's consideration of this statutory mitigating circumstance. Chambers v. State, 339 So. 2d 204, 209 (Fla. 1976) (opinion of Justices England, Adkins and Sundberg, concurring). Reversal for resentencing is required.

POINT XX

THE TRIAL COURT ORDER IS MATERIALLY FLAWED IN THAT IT IS BASED PARTIALLY ON FALSE INFORMATION.

The trial court improperly relied on false information in rejecting a statutory mitigating circumstance. This denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Fla. Stat. 921.141.

The trial court rejected the statutory mitigator described in Fla. Stat. 921.141(6)(b) (under the influence of extreme mental or

emotional disturbance) based partially on materially false information.

> The Court finds the applicability of this mitigating circumstance was rebutted by the defendant's own expert. Dr. Caddy testified, based upon his examination of the defendant, interviews with family and friends, and, a review of the facts of this case, that it is his expert opinion that the defendant was not under extreme mental or emotional disturbance when he committed the murder of Margaret Ann Strack.
>
> R3579.

This was directly the opposite of Dr. Caddy's testimony:

> Q. [Defense Counsel]: Okay, having had a chance to reevaluate your position in this case through Mr. Satz's cross examination and the other things that were brought to light, may I ask you whether or not you have an opinion within a reasonable degree of psychological certainty as to whether or not the capital felony involving the death of Margaret Ann Strack was committed while William Elledge was under the influence of extreme mental or emotional disturbance? Do you have such an opinion?
>
> A. [Dr. Caddy]: My opinion is the same now as it was yesterday. And my view is that he was operating under extreme emotional duress at the time.
>
> R2374.

It is clear that both the Florida Constitution and the United States Constitution require that a death sentence be reliable. Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); Burr v. State, 576 So. 2d 278 (Fla. 1991). A death sentence based, in part, on false information is unreliable. Johnson, supra; Burr, supra. Reversal for resentencing is required.

POINT XXI

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND FIND NON-STATUTORY MITIGATING CIRCUMSTANCES PROPOSED BY DEFENSE COUNSEL.

The trial court erred in failing to consider and find non-statutory mitigating factors proposed by defense counsel. The error denied Mr. Elledge's rights pursuant to Article I, Sections 2, 9, 16,

APPENDIX K

Penalty Phase Jury Instructions

are limited to any of the following that are established by the evidence.

One, the Defendant has been previously convicted of another capital offense or of a felony involving the use of violence to some person. The crime of murder in the first degree is a capital offense.

Two, the crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of rape.

Three, the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

Four, the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel.

Heinous means extremely wicked or shockingly evil.

Atrocious means outrageously wicked and vile.

Cruel means designed to inflict a high degree of pain with utter indifference to, or even with enjoyment of, the suffering of others.

The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are:

One, the crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

Two, the victim was a participant in the Defendant's conduct or consented to the act.

Three, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Four, any other aspect of the Defendant's character or record, and any other circumstance of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

Whenever the words reasonable doubt are used you must consider the following:

A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to find that an aggravating circumstance has not been established, if you have an abiding conviction that it has been established. On the other hand, if, after carefully considering, comparing and weighing the evidence, there is not an abiding conviction that an aggravating circumstance has been established, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance is not proved beyond a reason doubt and you must find that the aggravating circumstance is not established because the doubt is reasonable.

It is to the evidence introduced in this proceeding, and to it alone, that you are to look for that proof.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant, but by a

preponderance of the evidence. A preponderance of the evidence means that the probative weight, influence, force, or power of the evidence adduced, considered separately and collectively, with the reference to the issue involved. It does not mean the greater number of witnesses, but rather by the greater weight of the evidence. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

It has come to your attention in these proceedings that Mr. Elledge has previously received a death sentence. You are not to consider this previous sentence in any way in your deliberations. It would be a miscarriage of justice to speculate on why Mr. Elledge received such a sentence or what error occurred to cause that sentence to be vacated. You cannot base your recommended sentence in any respect on prior proceedings

in this case. Your recommended sentence must be based on the evidence induced -- Or introduced, I'm sorry, in these proceedings, and only on that evidence.

It is up to you as members of the jury to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your recommended sentence. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

Did the witness seem to have an opportunity to see and know the things about which the witness testified?

Did the witness seem to have an accurate memory?

Was the witness honest and straightforward in answering the attorneys' questions?

Did the witness have some interest in how this case should be decided?

Does the witness' testimony agree with the other testimony and other evidence in this case?

Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?

You may rely upon your own conclusions about a

witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Expert witnesses as I previously told you are like other witnesses with one exception, the law permits an expert witness to give his or her opinion.

However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert.

Like other witnesses, members of the jury, you may believe or disbelieve all or any part of an expert's testimony.

The Defendant exercised a fundamental right by choosing not to be a witness in this case. You must not view this as an admission of any aggravating factor or be influenced in any way by his decision. No juror should ever be concerned that the Defendant did or did not take the witness stand to give testimony in the case.

Statements claimed to have been made by the Defendant outside of court have been placed before you. Such statements should always be considered with caution and be weighed with great care to make certain that they were freely and voluntarily made.

Therefore, you must determine from the evidence that the Defendant's alleged statements were knowingly,

voluntarily and freely made.

In making this determination, you should consider the total circumstances, including but not limited to:

One, whether, when the Defendant made the statement, he had been threatened in order to get him to make it.

And two, whether anyone had promised him anything in order to get him to make it.

If you conclude the Defendant's out of court statements were not freely and voluntarily made, you should disregard them.

There are some general rules that apply to your discussion. You must follow these rules in order to return a lawful recommended sentence.

You must follow the law as it's set out in these instructions. If you fail to follow the law, your recommended sentence would be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

This case must be decided only upon the evidence that you have heard from the answers of the witnesses and have seen in the forms of exhibits in evidence and these instructions that I am now giving you.

This case must not be decided for or against anyone

because you feel sorry for anyone, or are angry at anyone.

Remember, the lawyers are not on trial. Your feeling about them should not influence your decision in this case.

Your advisory sentence as to what sentence should be imposed on this Defendant is entitled by the law and it will be given great weight by this Court in determining what sentence to impose in this case. It is only under rare circumstances that this Court could impose a sentence other than what you recommend.

It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited for talking to a lawyer about his or her testimony.

Feelings of prejudice, bias, or sympathy are not legally reasonable doubts and they should not be discussed by you in any way. Your recommended sentence must be based upon your views of the evidence and on the law contained in these instructions.

Deciding a recommended sentence is exclusively your job as members of the jury. I, as the Judge, cannot participate in that decision in any way. Please disregard anything that I may have said or done that

makes you think I prefer one recommended sentence over another.

The fact that the determination of whether you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determine that William Duane Elledge should be sentenced to death, your advisory sentence would be as follows:

We have a verdict form, two verdict forms, I'll read the second one to you in a moment.

Style of the Court, case number 75-87 CF10, my name as Judge, State of Florida, Plaintiff, versus William Duane Elledge, Defendant.

Advisory: A majority of the jury, by a vote of blank, advise and recommend to the Court that it impose the death penalty upon William Duane Elledge. A line for the foreperson as well as the date.

On the other hand, if by six or more votes the jury determines that William Duane Elledge should not be

sentenced to death, your advisory sentence would be as follows:

And once again I have prepared a verdict form, again style of the Court, case number, my name as Judge, State of Florida, Plaintiff, versus William Duane Elledge, Defendant.

The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon William Duane Elledge without possibility of parole for twenty-five years.

Once again a signature line for the foreperson as well as a line to date that form.

In just a few moments you'll be taken to the jury room by the bailiff. The first thing you should do is elect a foreperson. The foreperson presides over your deliberations like the chairperson of a meeting. It is the foreperson's job to sign and date the verdict form -- Or advisory form, I apologize.

When all of you have reached an advisory sentence in conformity with these instructions, the foreperson will bring the advisory form back to the courtroom when you return. Either a man or woman may be the foreperson of the jury.

In closing let me remind you that it's important that you follow the law spelled out in these

instructions in deciding your recommended sentence. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two centuries we have agreed to a constitution and to live by the law. No one of us has a right to violate those rules which we all share.

I'm going to send back with you to the jury room a complete written set of the instructions that I've now given you. Additionally, I will send back with you two blank advisory sentences, one for death by electrocution, the other for life imprisonment without the possibility of parole for twenty-five years. I will also send back to the jury room with you the indictment in this case.

At this time, members of the jury who took notes may also take your note pads back to the jury room.

Additionally, there are numerous exhibits that both the State and defense have placed in evidence. If you would like those exhibits, all you have to do is request them and they'll be brought to you.

From now forth any correspondence whatsoever that you need from the Court, be it a comment, a question, whatever else it might be, needs to be in writing. And there will be a note pad and pens of course available for that purpose. Whatever it is that you may need,

want to tell us, you need to put that in writing. Whoever the foreperson is please sign that piece of paper and most importantly please place the date as well as the time of your correspondence on that paper so we can maintain complete time records of what is taking place.

At this time are the twelve jurors able to retire and consider an advisory sentence?

Okay, that being the case, both Ms. Hoelbrandt as well as Ms. Davison, if you would just remain seated.

And the other twelve members of the jury you may retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by the foreperson and returned to the Court.

THE COURT: We are outside the presence of the twelve jurors. Is there any additions, deletions to the instructions as given? Mr. Laswell?

MR. LASWELL: I have none to tender, none to urge upon the Court and thank the Court for its kind reading of the instructions.

THE COURT: Mr. Satz.

MR. SATZ: No, Your Honor.

THE COURT: Okay. Ms. Hoelbrandt, Ms. Davison, I want to thank you very, very much for the time,

APPENDIX L

Section of Petitioner's Brief Dealing with Felony Murder Aggravating Circumstance

POINT XXV

THE FELONY MURDER AGGRAVATING CIRCUMSTANCE (FLORIDA STATUTES 921.141(5)(d)) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

The felony-murder aggravating circumstance (Florida Statute 921.141(5)(d) violates both the Florida and United States Constitutions. The use of this aggravator renders Mr. Elledge' death sentence unconstitutional pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Elledge filed a motion to declare this aggravator unconstitutional R3245-3252. The jury was instructed on this as an aggravating circumstance and the trial court found it as an aggravator R2864-2865, 3749-3757.

Aggravating circumstance (5)(d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree murder statute. Fla. Stat. 784.04(1)(a)2.

This aggravating circumstance violates both the United States and Florida Constitutions. The decisions of the United States Supreme Court have made clear that under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutional. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1983). (2) It "must reasonably

justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra.

It is clear that the felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation." See Fla. Stat. 921.141(5)(i). Rogers v. State, 511 So. 2d 526 (Fla. 1987). It is completely irrational to make a person who does not kill and/or intend to kill automatically eligible for the death penalty whereas a person who kills someone with a premeditated design is not automatically eligible for the death penalty. This aggravating circumstance violates the Eighth and Fourteenth Amendments pursuant to Zant, supra. This aggravating circumstance also violates Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or federal constitutional grounds. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992). This Court should follow these courts and declare this aggravator unconstitutional pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17, of the Florida Constitution.

Assuming arguendo, that this Court does not hold this aggravator unconstitutional in all cases, it is unconstitutionally applied in this case. The evidence in this case clearly indicates an impulsive reaction to screaming and frustration from sexual teasing R1235-1242. Additionally, there was extensive evidence of intoxication from alcohol and marijuana R1230. Indeed, the judge's comments in finding a factual basis for first degree murder indicate that he believed that the fact that the homicide was during a sexual battery was essential to making this a first degree murder R3110-3111. It is unconstitutional to use the fact of a sexual battery to make the offense first degree murder and to also use it as an aggravator.

POINT XXVI

ELECTROCUTION VIOLATES THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Mr. Elledge filed a motion attacking electrocution as punishment R3189-3193. This punishment violates the United States and Florida Constitutions. Electrocution is unconstitutional in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. Indeed, most states have abandoned electrocution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment. 39 OHIO STATE L.J. 96, 125 n.217 (1978). Malfunctions in the electric chair cause unspeakable torture. Buenoano v. State, 565 So. 2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

APPENDIX M

Petitioner's Plea Colloquy

in and out of situations all my life, and got my education a little bit of everywhere.

THE COURT: Have you been in trouble all your life, mostly?

THE DEFENDANT: Not really what you would call trouble. Juvenile mainly. Then I had one prior adult conviction.

THE COURT: What was that for?

THE DEFENDANT: Second degree assault. It was dropped to menacing with a weapon.

THE COURT: Have you ever been declared mentally incompetent, Mr. Elledge?

THE DEFENDANT: Not really mentally incompetent, but it was advised at one time that I receive out-patient therapy for a drug and alcohol problem.

THE COURT: You are aware this Court had you examined by Drs. Eichert and Taubel?

THE DEFENDANT: Yes.

THE COURT: Your attorney has a copy of that. I don't know if you saw that, but they felt, in their opinion, that you knew right from wrong.

In fact, if I remember correctly -- I don't have the file with me -- it seems to me like they were impressed about your intellectual ability.

THE COURT: The minimum of 30 years, maximum of life.

MR. McCAIN: Under the old statute.

THE COURT: That is what he is charged under.

MR. McCAIN: That's correct.

THE COURT: I looked over here, and I have the 1965 statutes in this courtroom.

On Count I, murder in the first degree, Mr. Elledge, the Court doesn't have any choice, if you are sentenced to life instead of death. That is the only two sentences on that offense. So the Court can't put you on probation, or anything lesser than that. Do you understand that?

THE DEFENDANT: Yes; I do.

THE COURT: You are represented by Mr. McCain, who is standing here with you. Have you discussed fully with him your case, and told him everything that you know about it?

THE DEFENDANT: Yes, sir.

THE COURT: Has Mr. McCain discussed with you any defenses that might be available in the case?

THE DEFENDANT: Yes; we have.

THE COURT: Has he given you the benefit of his advice?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied that Mr. McCain has represented you the best he can, and done what could be expected of him?

THE DEFENDANT: Yes; I am.

THE COURT: Is anybody forcing you to plead guilty?

THE DEFENDANT: No.

THE COURT: Has anybody threatened you in any way to make you plead guilty?

THE DEFENDANT: No.

THE COURT: Has anybody promised you anything in any way, that you are going to be rewarded in any fashion, or you are going to get probation or leniency, or a life sentence like if you plead guilty?

THE DEFENDANT: No; they haven't.

THE COURT: The extent of the discussion in this case, Mr. Elledge, if I remember correctly, between your attorney and the State's Attorney, Mr. Satz, and myself is that I indicated that, in all fairness and honesty to you, that if you plead guilty, I just couldn't say what I would do because I would have to make that decision at some other time; and I wouldn't try to make that decision ahead of time.

So I didn't want you to plead guilty, or try to mislead you in any way to get you to plead guilty, you know, because I just didn't know what the sentence would be. But, I would be inclined, if you so desired, to empanel a 12-man or 12-person jury, and submit the aggravating and mitigating circumstances, whatever they want to, either side, under the statute, to the jury; and get their recommendation, which would be an advisory sentence only.

I am not really bound by that under the law, but as I told Mr. McCain and Mr. Satz, there are possibly occasions when I would not be bound by their recommendations. But, in my opinion, seven people's opinion is better than one; and I would be hard pressed to go against the recommendation of the jury, whichever way they would recommend.

Has Mr. McCain told you that?

THE DEFENDANT: Yes.

THE COURT: Wasn't that the only indication I made?

MR. SATZ: Yes, Your Honor.

MR. McCAIN: Your Honor, for the record, that was exactly what His Honor indicated to me.

THE COURT: It is an awesome responsibility

make that decision, and I welcome the help from jury to make that decision.

I think that is really too much of a decision or one individual to try to make. I could do it, it I wouldn't welcome it.

Knowing that you could be sentenced to death or this crime of murder in the first degree, r. Elledge, do you still wish to plead guilty? r. Elledge, do you still wish to plead guilty?

THE DEFENDANT: Yes; I do.

THE COURT: Knowing you could be sentenced o life in prison, or any number of years with a inimum of 30 years on the rape in Count II, do ou still wish to plead guilty to that?

THE DEFENDANT: Yes.

THE COURT: The Court will make the finding hat William Duane Elledge knows what he is doing; hat he intelligently, understandingly and dvisingly wishes to plead guilty to the charge of urder in the first degree as alleged in Count I f this Indictment; and plead guilty to the charge f rape as alleged in Count II of this Indictment.

The Court, therefore, accepts these pleas, nd they shall be so entered.

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A I met the young woman in a bar on the beach in Hollywood.

Q Did you have a few drinks with her?

A I had several drinks with her; yes.

Q Can you give me your best estimate of how many?

A I would say no less than ten.

Q Did she have several drinks, too?

A She also had several drinks; yes.

Q Was she drinking beer?

A She was drinking beer.

Q What were you drinking?

A I was drinking Seven and Seven on the ice.

Q Did there come a time when you invited her to go to your room?

A Yes.

Q Can you recall where that room was located?

A It was at a motel on the beach about two blocks from the bar.

Q At the present time, can you remember the name of the motel?

A No; I can't.

Q You had a single room there?

A Yes; I did.

Q Did she go to the room with you willingly?

A Yes; she did.

Q What was your purpose in going to the room?

A I was going to smoke some marijuana.

Q Did the two of you arrive at your room?

A Yes; we did.

Q How did you get from the bar over there to where you had your room?

A In her car.

Q When you got up to your room, did you, in fact, smoke any marijuana?

A Yes; we did.

Q Did both of you?

A Yes.

Q During that period of time then, what happened?

A We got good and loaded, and the young woman started sexually teasing me, and I got --

Q Were you aroused sexually?

A Very much so.

Q Then did there come a period of time when she declined to engage in sexual relations with you?

A I wouldn't say declined. I would say refused.

Q Refused?

A Yes; she did.

Q Then what happened at that point?

A I just kind of blew my cool, and told her she is going to, anyway. I just kind of, well, freaked out.

I had been previously involved in a relationship where my girlfriend didn't like sex. She thought it was dirty, and it created problems with us.

Q That girlfriend was somebody other than this particular girl; isn't that correct?

A Yes; that's right.

Q Did there come a time then when you did, in fact, force sex on her?

A Yes; I did.

Q What else occurred, if anything, while you were engaged in doing that?

A I started strangling the young woman; and to the best of my knowledge, I must have choked her for 15, 20 minutes. I'm not really sure of how long it was.

But, I just kind of blacked out, and lost all control of what I was doing; and she started refusing to do what she had started out to do.

Q Then what happened?

A I realized, you know, what I had done by seeing her there; and I decided I had better get her out of the motel.

Q Did you do that?

A I waited until the sun went down, and I drug her out the back door, took her out and put her in the back seat of the car, and drove to a church parking lot and dumped her out in the church parking lot.

MR. McCAIN: Your Honor, I think, as far as the case that we are involved in here today, that that should conclude the testimony regarding this particular Indictment, unless His Honor has some more detailed questions.

THE COURT: Were you in the process of -- I do have a couple. I don't want to interrupt you now.

Were you in the process of raping her, Mr. Elledge, at the time you were choking her?

THE DEFENDANT: I did start to choke her when I was in her; yes.

THE COURT: Did you finish the raping before you killed her, or do you know?

THE DEFENDANT: I really can't recall. I sort of blacked out.

THE COURT: About what time of the afternoon or day was this, did this occur?

THE DEFENDANT: It was about -- between 4:00 and I would say 5:30.

THE COURT: Then you had about a three-hour

wait before sundown, then?

THE DEFENDANT: I really don't know. I was just too --

THE COURT: You just stayed in the room?

THE DEFENDANT: I was pretty well loaded, and I didn't know what time it was. I didn't have a watch or anything like that.

THE COURT: Do you have any questions, Mr. Satz?

MR. SATZ: No, Your Honor.

MR. McCAIN: I have one in addition that I forgot to ask.

This all did occur on August 24, 1974?

THE DEFENDANT: Yes; it did.

MR. McCAIN: That's all.

THE COURT: The Court is going to make a finding then that there is a factual basis to accept this plea and substantiate the charge; and the Court will further make a finding that the murder, as alleged in Count I, did occur, in fact, in the commission of the felony of rape.

It is my understanding that, if a murder occurs in the commission of a rape, then it is murder in the first degree.

MR. SATZ: Yes, sir.

MR. McCAIN: No question about it, Judge.

THE COURT: I have reviewed that statute, and I will make the finding that, on the factual basis, the murder did occur while the defendant was in the commission of the rape, or the attack be as a result. There is a factual basis for the finding of guilt in this case as to Count I, murder in the first degree, as alleged in the Indictment.

I will make the same finding, that there is a factual basis to accept the plea as to Count II of rape as alleged in Count II of this Indictment.

Accordingly, based upon your plea and the factual testimony presented here, the Court will adjudge you to be guilty of the crime of murder in the first degree as alleged in Count I.

The Court will hereby adjudge you to be guilty of the crime of rape as alleged in Count II.

Gentlemen, we can begin empaneling the jury. It will probably be better to go ahead and empanel the jury today. Then we can have the second stage of this proceeding beginning tomorrow when everybody is fresh, when you have a chance to think clearly. Then we can complete it tomorrow.

MR. McCAIN: That will be fine, Judge.

THE COURT: You may step down, Mr. Elledge.

(Thereupon, the witness was excused.)

THE COURT: We will be in recess for 15 minutes.

MR. SATZ: Would it be possible, just as a part of this plea taking here, that we attach a copy of Mr. Elledge's statement in reference to this homicide, and make it part of the record?

MR. McCAIN: We have no objection. I think it might be a good idea, too.

THE COURT: You mean the statement that I did not listen to?

MR. SATZ: Right. It has been transcribed, and it is part of the clerk's records.

THE COURT: It will be made part of the record.

MR. McCAIN: I think it ought to be anyway, Judge, really.

* * * * * * * * * * * * * * * * * * * *

CERTIFICATE

State of Florida)
) SS:
County of Broward)

I, JUDY SCHILLING, RPR, do hereby certify that the foregoing, pages 1 to and including 17, is a true and correct transcription of my stenographic notes of proceedings had and testimony taken before the Honorable M. Daniel Futch, Jr., Presiding Judge, on the 17th day of March, 1975, commencing at 2:40 o'clock p.m., in the City of Fort Lauderdale, County of Broward, State of Florida.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal this 22nd day of February, 1983.

Judy Schilling
JUDY SCHILLING, Registered
Professional Reporter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Carolyn M. Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 by U.S. Mail this 23rd day of July, 1998.

Of Counsel

CASE NO. 98-5410

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM DUANE ELLEDGE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****
ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA
****

BRIEF OF RESPONDENT IN OPPOSITION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT DEPUTY ATTORNEY GENERAL
Florida Bar No. 158541

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300 Ext. 4566

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I.

Whether the delay in carrying out the death sentence in this case violates the prohibition against cruel and unusual punishment and the Eighth Amendment to the United States Constitution.

II.

Whether the Florida Supreme Court's statement that the trial court's affirmative reliance on false information is harmless error violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

III.

Whether Florida's felony murder aggravating circumstance does not genuinely narrow the class of persons eligible for the death penalty as required by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

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CASE NO. 98-5410

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM DUANE ELLEDGE,

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v.

STATE OF FLORIDA,

Respondent.

OPINION BELOW

The decision of the Florida Supreme Court in Elledge v. State, 706 So.2d 1340 (Fla. 1997), is set out in Petitioner's appendix to his petition.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257. The modified opinion of the Florida Supreme Court following rehearing was rendered March 5, 1998. Elledge v. State, supra. Petitioner's request for extension of time dated May 19, 1998, was granted by the Court until July 23, 1998.

PROVISIONS OF LAW

Respondent accepts Petitioner's provisions of law as set forth in the petition.

STATEMENT OF THE CASE AND FACTS

Elledge confessed to the rape and murder of Margaret Ann Strack and the murder and robbery of Edward Gaffney in Hollywood, Florida; and the murder and robbery of Kenneth Nelson in Jacksonville, Florida, between August 24 and August 26, 1974.

On October 30, 1974, Elledge pled guilty to the murder of Kenneth Nelson in Jacksonville, Florida, and was sentenced to life imprisonment. On March 17, 1975, Elledge pled guilty to the rape and murder of Miss Strack. Subsequently, Elledge pled guilty to the murder and robbery of Edward Gaffney and was sentenced to life imprisonment. On March 18, 1975, Elledge was sentenced to death following a jury's death recommendation by a vote of 11 to 1, of the murder and rape of Miss Strack.

On appeal, the Florida Supreme Court reversed the sentence and remanded the case for a new sentencing hearing, Elledge v. State, 346 So.2d 998 (Fla. 1977). Elledge was again sentenced to death on remand and that sentence was affirmed by the Florida Supreme Court, Elledge v. State, 408 So.2d 1021 (Fla. 1982).

In his collateral attack to the judgment and sentence of death, Elledge questioned the voluntariness of his guilty plea and alleged ineffectiveness of trial counsel. Relief was denied in

Elledge v. Graham, 432 So.2d 35 (Fla. 1983), cert. denied, 464 U.S. 986 (1983). Subsequently, Elledge received federal habeas corpus relief from the Eleventh Circuit in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), reh'g granted in part, 833 F.2d 250 (11th Cir. 1987) (based on the possibility the jury may have observed Elledge's shackles at the penalty hearing).

A third sentencing proceeding was held in 1989, at which time Elledge was again sentenced to death following a new sentencing proceeding before a jury. On appeal, the death sentence was vacated, Elledge v. State, 613 So.2d 434 (Fla. 1993), based on sentencing deficiencies.

On June 10, 1993, prior to the fourth resentencing, Elledge again attempted to withdraw his earlier plea of guilty. That request was denied and on November 1, 1993, a new sentencing jury was empaneled to entertain a new sentencing proceeding. On November 19, 1993, the jury recommended that Elledge be sentenced to death for the murder of Margaret Ann Strack by a vote of 9 to 3. Written memoranda was requested of both sides with regard to sentencing issues and, at the request of the defense, additional opportunity was given Elledge to be heard on January 28, 1994, regarding the appropriateness of the sentence. On February 4, 1994, the trial court again sentenced Elledge to death. The aggravation found by the trial court included that the defendant had been previously convicted of another capital felony or a felony

involving the use or threat of violence to a person, §921.141(5)(b), Fla.Stat.,; that the capital felony was committed while Elledge was engaged in the commission of or attempt to commit, or escape after committing a rape (sexual battery), §921.141(5)(d), Fla.Stat.; the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, §921.141(5)(e), Fla.Stat., and the capital felony was especially heinous, atrocious or cruel, §921.141(5)(h), Fla.Stat., in particular:

> The Defendant's own statement proves that the strangulation of Margaret Ann Strack continued for approximately fifteen [15] minutes. The evidence established that after the victim threatened to tell the police that the Defendant had or attempted to rape her, he grabbed her by the throat and choked her to death, while at the same time sexually forcing himself on her. The Defendant's statement and testimony of the medical examiner, Dr. Fatteh, clearly established that the victim fought in vain for her life.
>
> She struggled against the Defendant, fought for air and hit the walls with her arms. The Defendant then pulled her off the bed and onto the floor, where he continued choking her with both hands until she was dead. Dr. Fatteh testified that Margaret Ann Strack's cause of death was asphyxiation due to strangulation. He testified that she would have lost consciousness within (1) to (2) minutes of the choking.
>
> The Defendant's statement, however, suggests that her struggle for life may have lasted even longer as he raped and choked her for approximately (15) minutes. It was only after she turned purple, her eyes rolled into the back of her head, she stopped struggling, and gave a last short gasp for air, that he released his strangle hold on her. . . .

> The Court finds that the State has clearly proven, beyond a reasonable doubt, that Margaret Ann Strack's death was committed in the especially heinous, atrocious or cruel manner. Therefore, this aggravating circumstance is applicable.

(TR 3752-3753).

The trial court found the following statutory and nonstatutory mitigating circumstances established by a preponderance of the evidence. In reviewing each of the statutory mitigating circumstances found in §921.141(6), Fla.Stat., the court observed that none of those factors were proven by a preponderance of the evidence. With regard to nonstatutory mitigating circumstances, the court went through the following:

> 1. Family Background.
>
> The Court finds it has been established that the defendant had a difficult and abusive childhood by a preponderance of the evidence. However, this factor is given little weight by the Court.

(TR 3762).

> 2. Remorse, Cooperation And Confession.
>
> The Court finds that the defendant has not demonstrated any remorse for the murder of Margaret Ann Strack, thereby failing to establish this mitigating circumstance by a preponderance of the evidence.

(TR 3764).

> 3. Post-Conviction Life.

The trial court rejected that Elledge was a "particularly well-behaved prisoner" (TR 3765), but did find that the evidence

established by a preponderance of the evidence that Elledge had been a good friend, husband and stepfather and a supporter of his family. (TR 3765). The Court concluded that evidence to the contrary was proven during the penalty phase proceeding with regard to prison adjustment:

> While on death row, the most restricted and confined environment in the state prison system, the defendant received (19) disciplinary reports and wrote several threatening letters. . . . The applicability of this proposed mitigating circumstance has additionally been refuted by the defendant's own admission in court. The defendant admitted that he still has the same problems 'inside' now as he did at the time of the murders."

(TR 3766).

4. Delay, An Unusual Mitigating Factor.

The trial court concluded:

> The defendant has presented additional evidence with respect to this factor in a hearing before this Court on January 28, 1994, subsequent to the jury's recommendation. The essence of this argument was that due to the passage of time, there was difficulty locating and presenting evidence to establish mitigation.
>
> Philip Charlesworth, Chief Investigator for the Public Defender's Office, testified as to the efforts and difficulties encountered in searching for the defendant's past. Assisting him in the investigation were three investigators from his office, investigators from two different out-of-state public defenders' offices, and a private investigator. He and his own investigators traveled many times to other states and found

> that information regarding the defendant's background was hard to gather.
>
> The passage of time has obviously played a role in the defendant's difficulties of finding his past in search of evidence of mitigation. However, the Court finds these difficulties are primarily due to the defendant's lifestyle prior to his 1974 arrest in Florida. A contemporaneous search in 1975 would have been virtually as difficult as it was in 1993. The defendant was a drifter, his family moved from place to place, school to school, without establishing strong ties to any community. Also, the defendant testified that he never held a job for more than a week of two. Testimony from a former employer, employees, school friends and neighbors would be essentially meaningless and impossible to obtain then and now.
>
> Clearly the legal history of this case is unprecedented. Since the commission of the murder of Margaret Ann Strack, the defendant has, prior to this proceeding, on three occasions been sentenced to death. He has spent the majority of the last (19) years confined on Florida's death row. During the last (19) years, many of the defendant's relatives have died. Due to his incarceration, the defendant claims he has not had the opportunity to demonstrate to the court his rehabilitation as he had not been part of a free society.
>
> However, this is due to the fact that he was under a sentence of death for the murder of Margaret Ann Strack, to which he entered a plea of guilty in 1975. There is no statute of limitations for the crime of murder in the first degree. F.S., Section 775.15(1). Additionally, the time delay between the offense and the imposition of the sentence does not negate or diminish the conviction for purposes of a capital sentencing proceeding. Melendez v. State, 498 So.2d 1258 (Fla. 1986).

> Although it is an interesting issue, more appropriately raised in another form, the fact that defendant has served (19) years on death row plays no part in these proceedings and is not a mitigating circumstance. The court was ordered by mandate to conduct and preside over a new sentencing phase proceeding. The reason for imposing sentence on this defendant in 1994, is no different than the reason for imposition of sentence in 1975: the defendant committed the brutal rape and murder of Margaret Ann Strack in 1974.

(TR 3766-3768).

Elledge's taped confession presents a succinct accounting of the facts surrounding Margaret Ann Strack's death. On Saturday, August 18, 1974, Elledge traveled from Toledo, Ohio, with Paula Fain, who he had planned to marry once he divorced his wife, Diane Elledge. Upon arrival in Hollywood, Florida, they lodged at the Alpine Village Apartments until August 23, when Elledge fought with his fiancé and they split up. He then went out and started drinking that day. Needing a place to stay, he ultimately checked into the Normandy Hotel, Room 3, staying for three nights. He showered and slept until the next afternoon until 2:00 p.m., and then went to the beach and the bars. Elledge recalled in his statement that he was sitting at the bar near the hotel, when a girl came up and started talking to him. He bought drinks. He was drinking Seagrams and 7-Up with no ice and she drank Budweiser. He identified a photograph of the victim Margaret Ann Strack as the girl who was in the bar with him and the person he killed on August 24, 1974. In his statement Elledge observed that he had had 9 to

10 drinks that day and that Miss Strack had had 4 to 5 drinks at the bar. They then left to go smoke some marijuana. Around 5:30 or 6:00 p.m. that evening, they drove to Elledge's hotel in Miss Strack's blue 1967 Camaro convertible. When they got to the hotel, they talked awhile and smoked some marijuana. At some point shortly thereafter, Miss Strack purportedly started to sexually tease Elledge and she "grabbed hold of his joint and played with it." Miss Strack told Elledge that she was not going to do anything and he told her she was. Elledge stated that she had teased him too much and he could not hold back. He grabbed her by the throat with one hand and by the wrist with the other hand. He forced himself on top of her, at which point she pressed her fingernails into his wrist which made him mad. Elledge stated that he choked her as she gasped for air and stopped when she finally agreed to have intercourse. He tried to mount her, however, she again resisted and screamed. He grabbed her by the throat and forced himself into her. She yelled that she would call the police because he was raping her. Elledge said that he choked her screams off completely using his two hands around her throat and Strack started fighting and hitting the wall with her arms. Elledge confessed that he raised her up, choked her and then threw her on the floor. "Totally out of control", he continued to choke her for approximately 15 minutes until she turned purple. Miss Strack's

eyes rolled back into her head, she started to bleed from her nose and Elledge continued to choke her until she was dead.

Elledge waited until it got dark to get rid of the body. He washed Miss Strack's face and cleaned the floor in the bathroom area of the blood. He managed to get her into the trunk of her car, and ultimately dumped her in a church parking lot. After dumping the body, he picked up a hitchhiker with whom he went drinking. Later, driving around, he lost control of the car and smashed it into a fence.

He then ransacked a gas station and gained entry into a Pantry Pride grocery store through an airvent near the roofline. While in the grocery store, he ransacked several areas until he came upon Mr. Gaffney, who was a janitor in the store. His encounter with Mr. Gaffney resulted in Mr. Gaffney being murdered when Elledge fired two shots at a downward angle into Mr. Gaffney. Elledge left the store and walked across the parking lot to the Royal Castle coffee shop where he sat and drank a couple of cups of coffee. He then returned to his room at the Normandy Hotel, slept awhile and then, after rifling through Miss Strack's purse and hiding it, he left. Ultimately, he went to a Greyhound bus station where he caught a bus to Jacksonville, Florida.

Elledge, upon his arrival in Jacksonville, went to the Beacon Motel where he terrorized Mrs. Nelson, her husband and their grandchild, telling them that, "I've already killed two people this

week and one more won't matter. And if you don't believe me, you read the Hollywood papers." While Elledge was ransacking the living quarters of the motel, Mr. Nelson broke loose and went into the hallway. Mrs. Nelson testified at the fourth resentencing that she heard a shot, heard her husband say, "Don't son, you got me", and then heard another shot.

REASONS FOR DENYING THE WRIT

POINT I

THE DELAY IN CARRYING OUT THE DEATH SENTENCE IN THIS CASE DOES NOT VIOLATE THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Elledge first argues that due to the delays in carrying out the sentence of death since March, 1975, when that sentence was first imposed, he has been denied the right to have his sentence carried out in a manner that does not constitute cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution. Citing verbatim from the Memorandum of Justice Stevens, respecting the denial of certiorari in Lackey v. Texas, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995), and relying on the dissenting opinion of Judge Norris in McKenzie v. Day, 57 F.3d 1461 (9th Cir. 1995), superceded in banc, McKenzie v. Day, 57 F.3d 1493 (9th Cir. 1995), and the dissenting opinion of Judge Fletcher in Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998), Elledge argues that both in this country and "our Mother country"

well established Eighth Amendment principles have been violated because of the delays in carrying out the death penalty in his case. Specifically, he asserts "As a result of the abhorrent conditions to which he has been subjected during the last twenty-three years, William Elledge has endured a needlessly lingering form of torturous psychological punishment that, if the State has its way, will culminate in execution." (Petition, pg. 22).

Respondent would submit that although it has been twenty-three years since Elledge first pled guilty to the rape and murder of Margaret Strack, his fourth resentencing proceeding occurred in 1993, culminating in the new imposition of the death penalty. All delays were a result of his "successful litigation" in the appellate courts of Florida and the federal system. As Justice Stevens observed in his Memorandum in Lackey, supra:

> Closely related to the basic question presented by the petitioner is a question concerning the portion of the seventeen year delay that should be considered in the analysis. There may well be constitutional significance to the reasons for the various delays that have occurred in petitioner's case. It may be appropriate to distinguish, for example, among delays resulting from (a) a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the State. Thus, though English cases indicate that the prisoner should not be held responsible for delays occuring in the latter two categories, see id., at 33, 4 All. E.R. at 786, it is at least arguable that some portion of the time that has elapsed since this petitioner was first sentenced to death in 1978 should be excluded from the calculus.

Lackey v. Texas, 131 L.Ed.2d at 305-306.

In the instant case, prior to the fourth resentencing, Elledge raised the spectre that his rights were violated in a motion to preclude the death penalty based on delay in carrying out his execution. In Point XII of his brief before the Florida Supreme Court, he concluded: "Of thirty-six (36) people executed under Florida's current statute, none has been on death row as long as Mr. Elledge has. Appendix. The delay in carrying out this execution violates both the Florida and United States Constitutions. A reduction to life in required." (Elledge's Brief, pg. 64). The Florida Supreme Court, in Elledge v. State, supra, observed in footnote 4 that this claim was an issue before the court and concluded summarily that the claim was without merit. Elledge v. State, 706 So.2d at 1347. See also: Porter v. State, 653 So.2d 374, 380 (Fla. 1995) (similar claim rejected for delay of two decades in carrying out sentence); Hitchcock v. State, 578 So.2d 685 (Fla. 1990), reversed on other grounds, ___ U.S. ___, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). Interestingly, the trial court viewed Elledge's assertion in a slightly different perspective by addressing the delay as an unusual mitigating factor. The trial court, at (TR 3766-3768), concluded the following:

> The defendant has presented additional evidence with respect to this factor in a hearing before this Court on January 28, 1994,

subsequent to the jury's recommendation. The essence of this argument was that due to the passage of time, there was difficulty in locating and presenting evidence to establish mitigation.

Philip Charlesworth, Chief Investigator for the Public Defender's Office testified as to the efforts and difficulties encountered in searching for the defendant's past. Assisting him in the investigation were three investigators from his office, investigators from two different out-of-state public defenders' and a private investigator. He and his own investigators traveled many times to other states and found that information regarding the defendant's background was hard to gather.

The passage of time has obviously played a role in the defendant's difficulties of finding his past in search of mitigation. However, the Court finds these difficulties are primarily due to the defendant's lifestyle prior to his 1974 arrest in Florida. A contemporaneous search in 1975 would have been virtually as difficult as it was in 1993. The defendant was a drifter, his family moved from place to place, school to school, without establishing strong ties to any community. Also, the defendant testified he never held a job for more than a week or two. Testimony from a former employer, employees, school friends and neighbors would be essentially meaningless and impossible to obtain then and now.

Clearly, the legal history of this case is unprecedented. Since the commission of the murder of Margaret Ann Strack, the defendant has, prior to this proceeding, on three occasions been sentenced to death. He has spent the majority of the last (19) years confined on Florida's death row. During the last (19) years, many of the defendant's relatives have died. Due to his incarceration, defendant claims he has not had the opportunity to demonstrate to the Court

his rehabilitation as he has not been part of a free society.

However, this is due to the fact that he was under a sentence of death for the murder of Margaret Ann Strack, to which he entered a plea of guilty in 1975. There is no statute of limitations to the crime of murder in the first degree. F.S. Section 775.15(1). Additionally, the time delay between the offense and the imposition of the sentence does not negate or diminish the conviction for purposes of a capital sentencing proceeding. Melendez v. State, 498 So.2d 1258 (Fla. 1986).

Although it is an interesting issue, more appropriately raised in another form, the fact that the defendant has served (19) years on death row plays no part in these proceedings and is not a mitigating circumstance. The Court was ordered by mandate to conduct and preside over a new sentencing phase proceeding. The reason for imposing sentence on this defendant in 1994, is no different than reason for imposing sentence in 1975: the defendant committed the brutal rape and murder of Margaret Ann Strack in 1974.

Respondent would submit that although the issue has been preserved for review and is "wrapped" in a federal constitutional-right shroud, the underpinnings of Elledge's claim, that he has spent twenty-three years on Florida's death row in "torture and agony," is unsupported by any meaningful evidence. The record bears out that Elledge has continually litigated the validity of not only his plea of guilty but the appropriateness of the sentence imposed. The fact that protracted litigation has occurred, neither diminishes the validity of the ultimate sentence imposed in 1994, nor supports conclusory rhetoric that his existence in prison was

torturous or in any way exceptional from any other individual who is either sentenced an exhorbitant term of years or a life sentence.[1] Respondent would submit that unlike Coker v. Georgia, 433 U.S. 584 (1977), or Enmund v. Florida, 458 U.S. 782 (1982), the sheer passage of time pales as an Eighth Amendment violation in comparison to findings by the Court that, in imposing the death penalty in Coker for rape, or imposing the death penalty in Enmund for merely participating in a robbery during which a killing took place, violate the Eighth Amendment. See Herrera v. Collins, 506 U.S. 390 (1993); Reno v. Flores, 507 U.S. 292 (1993), and Penry v. Lynaugh, 492 U.S. 302 (1989).

Absent some demonstrable evidence that the Eighth Amendment has been violated, Elledge has failed to assert a basis upon which the imposition and affirmance of a fourth death sentence in 1993 for the murder of Margaret Strack should be vacated and he be sentenced to life imprisonment.

---

[1] Based on this theory, a death row inmate sentenced to death, whose sentence has not been timely carried out, would be released from incarceration, since the torture and agony was his confinement.

POINT II

WHETHER THE FLORIDA SUPREME COURT'S STATEMENT THAT THE TRIAL COURT'S AFFIRMATIVE RELIANCE ON FALSE INFORMATION IS HARMLESS ERROR VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Elledge next argues that the Florida Supreme Court erred in performing a harmless error analysis pursuant to Chapman v. California, 386 U.S. 18 (1967), regarding an error by the trial judge when he misspoke and relied on "false information" in rejecting a statutory mitigating circumstance. Respondent would submit that the Florida Supreme Court did an appropriate harmless error analysis and concluded, based on the totality of the facts pertaining to that mitigating factor, that any error was harmless beyond a reasonable doubt. Elledge v. State, 706 So.2d at 1347.

In explaining the reasons for rejecting the statutory mitigating factor, §921.141(6)(b), Fla.Stat., that Elledge was under the influence of extreme mental or emotional disturbance, the trial court misstated what Dr. Caddy, a defense expert, observed about Elledge as to whether he was under the influence of extreme mental or emotional disturbance. The trial court found:

> The Court finds the applicability of this mitigating circumstance was rebutted by the defendant's own expert. Dr. Caddy testified, based upon his examination of the defendant, interviews of the family and friends, and, a review of the facts of this case, that it is his expert opinion that the defendant was not under extreme mental or emotional disturbance when he committed the murder of Margaret Ann Strack. (TR 3759).

The record actually reveals that, after a lengthy cross-examination, Dr. Caddy admitted that he disagreed in material part with much of another expert's diagnosis of Elledge. On redirect, Dr. Caddy did state to the jury that Elledge suffered from extreme emotional and mental duress at the time of the crime:

> Q: Okay, having had a chance to re-evaluate your position in this case through Mr. Satz's cross-examination other things that were brought to light, may I ask you whether or not you have an opinion within a reasonable degree of psychological certainty as to whether or not the capital felony involving the death of Margaret Ann Strack was committed while William Elledge was under the influence of extreme mental or emotional disturbance? Do you have such an opinion?
>
> A: My opinion is the same now as it was yesterday. My view is that he was operating under extreme emotional duress at the time.

(TR 2374).

Although the trial court did misstate what Dr. Caddy's views ultimately were with regard to whether Elledge suffered from extreme emotional or mental disturbance, the trial court's rejection of this statutory mitigating factor was not premised on that conclusion. Rather, it was premised on the testimony presented by Dr. Stock as to what Elledge's test revealed:

> . . . Dr. Stock found that the defendant was malingering, which gave rise to a descriptive result on the MMPI II. The doctor testified that the defendant's average IQ ruled out retardation, which is a primary indicator of fetal alcohol syndrome. Also, contrary to Dr. Schwartz's findings and consistent with Dr. Caddy's, Dr. Stock concluded that the defendant did not suffer from fetal alcohol syndrome and found no indications of any organicity. Also, the defendant did not suffer from any mental illness, impulse control disorder, or post-traumatic stress disorder. Dr. Stock concluded that the defendant had an anti-social personality disorder. Dr. Stock testified that this is not a mental illness, but a lifelong history of a person who makes bad choices in life and that these choices are conscious and volitional. . . .
>
> The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Margaret Ann Strack was committed. As such, the trial court finds that the mitigating circumstance does not apply.

(TR 3759-3760).

The Florida Supreme Court, after reviewing the aforenoted portions of the record, concluded:

> On this record, we conclude beyond a reasonable doubt that the trial court's misstatement of Dr. Caddy's views did not affect the outcome. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Elledge v. State, 706 So.2d at 1347.

Moreover, although the trial court rejected as a mitigating factor that Elledge did not suffer from extreme mental or emotional disturbance, the underpinnings of that factor were also considered with regard to nonstatutory mitigation:

> It is evident from the sentencing order that the trial court considered both proposed mitigators. The trial court acknowledged that alcoholism influenced Elledge's life, and to the extent that his parents were alcoholic and

he suffered the physical and mental abuse resulting from those circumstances, the court found nonstatutory mitigation. The judge rejected mental health problems as mitigation based on his findings that the statutory mitigators did not apply. The court found Dr. Stock credible when he testified that Elledge suffered no mental illness but had an anti-social personality disorder -- meaning Elledge had a lifelong history of making bad choices which were conscious and volitional . . .

We likewise find that the trial court did not err in its finding 'little weight' to child abuse as a nonstatutory mitigators. The 'weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.' (cites omitted). The trial court found that Elledge had a difficult and abusive childhood, but was influence by testimony revealing that Elledge enjoyed a close relationship with his father:

> Both Danny Elledge and Connie Moffett described their father as a kind and wonderful man. Father Ken Roach, former Jacksonville detective, testified that after being apprehended, the defendant spoke by telephone with his father. He said the defendant was very open and emotional with his father during the telephone call.
>
> The trial court did not abuse its discretion 'for we cannot say that no reasonable person would give this circumstance [little] weight in the calculus of this crime.' . . .

706 So.2d at 1347.

In Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994), the United States Supreme Court concluded on a similar issue:

> . . . Contrary to petitioner's assertion, Johnson [v. Mississippi, 486 U.S. 578 (1988)], does not stand for the proposition that the mere admission of irrelevant and prejudicial evidence requires the overturning of a death sentence.
>
> Petitioner's argument, pared down, seems to be a request that we fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings. We have not done so in the past, however, and we will not do so today. The Eighth Amendment does not establish a federal code of evidence to supercede state evidentiary rules in capital sentencing proceedings. (Cite omitted). . . . We believe the proper analytical framework in which to consider this claim is found in Donnelly v. DeChristoforo, 416 U.S. 637, 643, 40 L.Ed.2d 431, 94 S.Ct. 1868 (1974). There we addressed a claim that remarks made by the prosecutor during his closing argument were so prejudicial as to violate the defendant's due process rights. We know that the case was not one in which the state had denied a defendant the benefit of a specific constitutional right, such as the right to counsel, or in which the remarks so prejudiced a specific right as to amount to a denial of that right. (Cite omitted). Accordingly, we sought to determine whether the prosecutor's remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Ibid. We conclude, after a 'examination of the entire proceedings,' that the remarks did not amount to a denial of constitutional due process. Ibid.

Romano v. Oklahoma, 129 L.Ed.2d at 12-13.

The Court ultimately concluded that, ". . . To hold on the basis of this record that the admission of evidence relating to petitioner's sentence in the Thompson case rendered petitioner's

sentencing proceeding for the Sarfaty murder fundamentally unfair ~~would~~ thus be an exercise in speculation, rather than reasoned judgment." 129 L.Ed.2d at 14.

Likewise, in the instant case, based on the totality of the evidence presented with regard to this statutory mitigating factor, the trial court's misstatement as to his accounting of what Dr. Caddy's conclusions were surplusage and not the compelling reasons given by the trial court for finding that statutory mitigating factor did not exist based on this record. The Florida Supreme Court equally did not err in concluding after reviewing all of the evidence at sentencing that the trial court's misstatements were harmless error beyond a reasonable doubt under State v. DiGuilio, supra, the State's version of Chapman v. California.

POINT III

WHETHER FLORIDA'S FELONY MURDER AGGRAVATING CIRCUMSTANCE DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AS REQUIRED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Elledge's last argument asserts that the "automatic application of the felony murder aggravating circumstance to a defendant whose first degree murder conviction rests on a felony murder theory fails to genuinely narrow the class of persons eligible for the death penalty under the Eighth Amendment." (Petition, pg. 30). Citing Tennessee v. Middlebrooks, 507 U.S.

1028 (1993), cert. dismissed as improperly granted, Tennessee v. Middlebrooks, 510 U.S. 124 (1993), Elledge argues that the Florida Supreme Court's opinion conflicts with three other states regarding the use of a similar aggravating circumstance citing Engleberg v. Meyer, 820 P.2d 70 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), and State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979). Elledge then asserts:

> The evidence in this case clearly indicates an impulsive reaction to screaming and frustration from sexual teasing (R 3105-3111). Additionally, there was extensive evidence of intoxication from alcohol and marijuana (R 3110). Indeed, the judge's comments in finding a factual basis for first degree murder indicate that he believed that the fact that the homicide was during a rape was essential to making this a first degree murder. (R 3110-3111). It is unconstitutional to use the fact of a rape to make the offense of first degree murder and to also use it as an aggravator.

(Petition, pgs. 31-32).

The Florida Supreme Court summarily denied without comment this issue on appeal. 706 So.2d at 1347. It should be observed, however, that the Florida Supreme Court has, on a number of occasions, entertained this issue and concluded that the Florida death penalty statute does genuinely narrow the class of persons eligible for the death penalty. Bertolotti v. State, 534 So.2d 386 (Fla. 1988), and see also Johnson v. Dugger, 932 F.2d 1360, 1368-69 (11th Cir. 1991) (relying, on part, upon Lowenfeld to reject argument "that Florida's law, by permitting [a conviction and] a

death sentence to be predicated on a single finding of felony murder, denied, [petitioner] constitutionally adequate sentencing safeguards"), cert. denied, 112 S.Ct. 427 (1991); Bertolotti v. Dugger, 883 F.2d 1503, 1527-28 (11th Cir. 1989) (rejecting challenge to use of felony murder aggravating circumstance in capital felony murder case), cert. denied, 497 U.S. 1032 (1990); Dunlap v. Dugger, 890 F.2d 285, 314, n.38 (11th Cir. 1989) ("Had Dunlap been convicted of felony murder at his first trial, there would be no impediment to a finding of a felony murder aggravating factor at sentencing."), cert. denied, 496 U.S. 929 (1990).

Respondent would submit that the decisions in Jurek v. Texas, 428 U.S. 262 (1976), and Lowenfeld v. Phelps, 484 U.S. 231 (1988), control the disposition of this issue. These cases make clear that as long as the Eighth Amendment narrowing function is satisfied in a capital sentencing scheme, it need not be fulfilled at any particular stage. While not unmindful that this Court has discussed on several occasions the requirement that the Eighth Amendment dicates that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder,'" Lowenfeld, 484 U.S. at 244 (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983), the narrowing function of the Florida Statutes does advance the Eighth Amendment objective of insuring that sentencing

discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrating capricious action," Gregg v. Georgia, 428 U.S. 153, 189 (1976), and supplies a "meaningful basis for distinguishing few cases in which 'the death penalty' is imposed from the many cases in which it is not." Gregg v. Georgia, 428 U.S. at 198. See also Spaziano v. Florida, 468 U.S. 447, 460, n.7 (1984), and Proffitt v. Florida, 428 U.S. 242 (1976).

In Lowenfeld v. Phelps, supra, the court considered a challenge to the Louisiana capital statute where the only aggravating circumstance found by the jury was identical to an element for the capital offense of first degree murder. In upholding the Louisiana statute, the court held:

> The narrowing function required for a regiment of capital punishment may be provided in either of two ways: the Legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

Lowenfeld, 484 U.S. at 246.

In Lowenfeld, one element of first degree murder under Louisiana law was that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person"; the overlapping aggravating circumstance was that "the offender knowingly created a great risk of death or great bodily harm to more than one person." 484 U.S. at 243. Lowenfeld relied upon

Jurek v. Texas, 428 U.S. 262 (1976), a case where the narrowing function was also performed at the guilt phase by the Texas Legislature's definition of the death-eligible offenses. The Jurek plurality opinion observed that while the Texas capital sentencing scheme -- unlike other capital states -- did not contain a list of statutory aggravating circumstances to be considered by the sentencer, the Legislature's "actions in narrowing the categories of murders for which a death sentence may either be imposed serves much the same person." 428 U.S. at 270.

A comparison with the statutes considered by this Court in Jurek and Lowenfeld demonstrates that the Florida death penalty statute clearly satisfies the Eighth Amendment narrowing requirement. The Florida statute in fact is more stringent than the Texas statute upheld in Jurek as it imposes additional prerequisites (beyond that required by the Eighth Amendment) before any capital defendant may be sentenced to death. First, at the guilt phase, a Florida jury must find that the defendant committed a death-eligible offense and convict of same, specifically first degree murder. Second, at the penalty phase, both the jury and the sentencing judge must conclude that at least one of several enumerated aggravating circumstances has been established beyond a reasonable doubt. One of these aggravating circumstances is that the murder was committed during the commission of an enumerated felony. Finally, the sentencing judge must find the existence of

any mitigating circumstances and determine whether the aggravating circumstances outweigh the mitigating circumstances. This three-step process clearly demonstrates for Lowenfeld purposes:

> The use of 'aggravating circumstances' is not an end in itself, but [one] means of genuinely narrowing the class of death eligible persons and thereby channeling the jury's discretion . . .
>
> The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicate one of the elements of the crime does not make this sentence constitutionally infirm.

Lowenfeld v. Phelps, 484 U.S. at 244, 246. See also Tuilaepa v. California, 512 U.S. 967, 129 L.Ed.2d 750, 114 S.Ct. 2630 (1994).

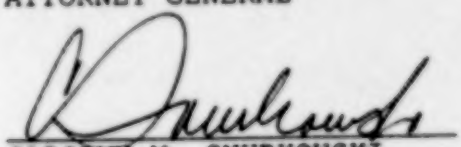
Based on the foregoing, Elledge has failed to demonstrate that Florida's death penalty statute violates the narrowing requirements for death-eligible individuals under the Eighth Amendment.

CONCLUSION

Wherefore, Respondent requests that this Court deny the petition for writ of certiorari in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



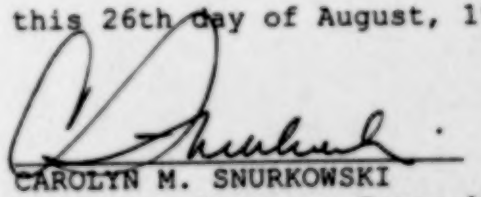
CAROLYN M. SNURKOWSKI
Assistant Attorney General
Florida Bar No. 158541

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 Ext. 4566

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard B. Greene, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 26th day of August, 1998.



CAROLYN M. SNURKOWSKI
Assistant Attorney General

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

Case No.: 98-5410

WILLIAM D. ELLEDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

REPLY TO RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

RICHARD B. GREENE *
Assistant Public Defender
Capital Crimes Division

*Counsel of record

11 pp

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the extraordinary delay in carrying out the death sentence in this case violates the prohibition on Cruel and Unusual Punishments in the Eighth Amendment to the United States Constitution?

2. Whether the Florida Supreme Court's conclusory holding that the trial court's affirmative reliance on false information is harmless error violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution?

3. Whether Florida's felony murder aggravating circumstance genuinely narrows the class of persons eligible for the death penalty as required by the Fifth, Eighth, and Fourteenth amendments to the United States Constitution?

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AUTHORITIES CITED

IN THE

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Case No.: 98-5410

WILLIAM D. ELLEDGE, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

STATEMENT OF THE CASE

In his original petition Mr. Elledge outlined the facts relevant to the three issues raised in this case. Respondent never disagrees with any of the facts in the original petition. However, Respondent includes a lengthy "Statement of the Case and Facts" in its petition. Petitioner would point out that much of this is irrelevant to any issue involved in this case.

REASONS FOR GRANTING THE WRIT

I. THE EXTRAORDINARY DELAY IN CARRYING OUT THE DEATH SENTENCE IN THIS CASE VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondent never quarrels with the fact that this is an important national issue that should be resolved by this Honorable Court. It never quarrels with the fact that the lower federal courts have used procedural bars to avoid reaching the merits of the issue and thus have not served as the laboratory to study this issue that Justice Stevens had hoped for in Lackey v. Texas, 514 U.S. 1045 (1995). It also does not dispute the fact that Mr. Elledge has been under death sentence since March, 1975. It does not dispute that this issue is properly preserved and that the Florida Supreme Court ruled on the merits. It does not dispute the fact that all of the delays were the result of his successful litigation concerning the violations of his rights under state law and/or the United States Constitution. Respondent's only claim concerning this issue seems to be that there is no "meaningful evidence" that spending twenty three years on death row is psychologically devastating. However, Mr. Elledge cited numerous opinions, books and articles documenting this phenomenon. Petition at 16-21. Respondent improperly asserts that Mr. Elledge is asking for release from incarceration in this point. Response at 16, n.1. However, the remedy he is seeking in this point is a life sentence.

This is a major national issue which should be resolved by this Honorable Court. This case is an excellent vehicle. The issue is

clearly preserved and Mr. Elledge has been under death sentence since March, 1975 due to his successful attacks on his sentence.

II. THE FLORIDA SUPREME COURT'S CONCLUSORY STATEMENT THAT THE TRIAL COURT'S AFFIRMATIVE RELIANCE ON FALSE INFORMATION IS HARMLESS ERROR VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent seems to rely virtually exclusively on Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004 (1994) for its response on this point. Romano is clearly distinguishable. In Romano, there was irrelevant, but accurate, evidence admitted before the jury. There was no indication that the jury relied on the evidence. Here, we know the judge relied on the evidence as he affirmatively placed it in his order. The information was false, not merely irrelevant. The error here is akin to that in Johnson v. Mississippi, 486 U.S. 578 (1988) which involved the use of false information. The Florida Supreme Court's application of harmless error in this case is similar to that previously held constitutionally deficient in Parker v. Dugger, 498 U.S. 308 (1991) and Sochor v. Florida, 504 U.S. 527 (1992). Here, there is no principled way to find beyond a reasonable doubt that the error was harmless.

III. FLORIDA'S FELONY MURDER AGGRAVATING CIRCUMSTANCE DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AS REQUIRED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent does not contest the fact that the decision of the Florida Supreme Court conflicts with the decisions of the three other state supreme courts on this important issue of federal constitutional

law. Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991). State v. Middlebrooks, 840 S.W.2d 317, 341-7 (Tenn. 1992), certiorari granted as Tennessee v. Middlebrooks, 507 U.S. 1028, certiorari dismissed as improvidently granted as Tennessee v. Middlebrooks, 510 U.S. 124 (1993). State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979). Respondent's reliance on Jurek v. Texas, 428 U.S. 262 (1976) and Lowenfield v. Phelps, 484 U.S. 231 (1988) is misplaced. The Texas and Louisiana schemes at issue in Lowenfield and Jurek are significantly different than the Florida statute. Texas has a very limited capital murder statute which requires proof of one of five aggravating factors in addition to a "knowing and intentional murder". 428 U.S. at 264-274. In Lowenfield the narrowing function was performed at the guilt phase.

> Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person."

484 U.S. at 246.

By contrast, Florida has a broad first degree murder statute which includes both premeditated murder and felony murder. Florida's felony murder aggravating circumstance does not genuinely distinguish between those who deserve the death penalty from those who do not. Florida's sentencing scheme permits one to be sentenced to death based upon the felony-murder aggravating circumstance which is co-extensive with the felony-murder finding that underlays the first degree murder

conviction itself. Thus, the Florida scheme arbitrarily takes one of the two broad classes of murderers and automatically makes it subject to death without requiring any additional elements to justify imposing the death penalty. In Florida the proof of the fact that the killing occurred during the course of a felony substitutes for proof of premeditation. There is no rational basis for treating felony murderers as a class more harshly than the class of premeditated murderers by making the former but not the latter automatically subject to the death penalty. Such an arbitrary result is prohibited by the Eighth Amendment.

"Punishment should be directly related to the personal culpability of the criminal defendant." Penry v. Lynaugh, 492 U.S. 302 (1989). Thus, one will not be eligible for the death penalty absent proof of additional criteria which make him more culpable or otherwise deserving a more severe sentence. Lowenfield, 484 U.S. at 244. Because there is no genuine narrowing at the definitional stage, and because there are no rational criteria establishing greater culpability established by the felony-murder aggravating circumstance at the sentencing stage, Florida's felony-murder sentencing scheme does not rationally justify enhancing punishment for all felony murderers over all premeditated murderers. Florida's sentencing scheme violates the Eighth Amendment.

This Court should grant certiorari on this important constitutional issue in which the state supreme courts are split. It should

reverse the decision of the Florida Supreme Court and follow the decisions of the Tennessee, North Carolina, and Wyoming supreme courts.

CONCLUSION

The Court should grant the Writ of Certiorari.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Richard B. Greene
RICHARD B. GREENE *
Assistant Public Defender

* Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Carolyn M. Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 by Federal Express this 22nd day of September, 1998.

Richard B. Greene
Of Counsel

SUPREME COURT OF THE UNITED STATES

WILLIAM D. ELLEDGE *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 98–5410. Decided October 13, 1998

The petition for a writ of certiorari is denied.

JUSTICE BREYER, dissenting.

The petitioner in this case has spent more than 23 years in prison under sentence of death. His claim—that the Constitution forbids his execution after a delay of this length—is a serious one.

The Eighth Amendment forbids punishments that are "cruel" and "unusual." Twenty-three years under sentence of death is unusual—whether one takes as a measuring rod current practice or the practice in this country and in England at the time our Constitution was written. See, *e.g.*, P. Mackay, Hanging in the Balance: The Anti-Capital Punishment Movement in New York State, 1776–1861, p. 17 (1982) (executions took place soon after sentencing in 18th century New York); *Pratt* v. *Attorney Gen. of Jamaica*, [1994] 2 App. Cas. 1, 17 (P. C. 1993) (same in United Kingdom); see also T. Jefferson, A Bill for Proportioning Crimes and Punishments (1779), reprinted in The Complete Jefferson 90, 95 (S. Padover ed. 1943); 2 Papers of John Marshall 207–209 (C. Cullen & H. Johnson eds. 1977) (petition seeking commutation of a death sentence in part because of lengthy 5-month delay).

Moreover, petitioner argues forcefully that his execution would be especially "cruel." Not only has he, in prison, faced the threat of death for nearly a generation, but he has experienced that delay because of the State's own faulty procedures and not because of frivolous appeals on his own part. His three successful appeals account for

18 of the 23 years of delay. A fourth appeal accounts for the remaining 5 years—which appeal, though ultimately unsuccessful, left the Florida Supreme Court divided 4–2. 706 So. 2d 1340 (1997); see Brief in Opposition 12 (conceding that "[a]ll delays were a result of [petitioner's] 'successful litigation' in the appellate courts of Florida and the federal system").

As JUSTICE STEVENS has previously pointed out, executions carried out after delays of this magnitude may prove particularly cruel. *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (STEVENS, J., respecting denial of certiorari). After such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise provide a necessary constitutional justification for the death penalty. *Ibid.* Moreover, British jurists have suggested that the Bill of Rights of 1689, a document relevant to the interpretation of our own Constitution, may forbid, as cruel and unusual, significantly lesser delays. *Riley* v. *Attorney Gen. of Jamaica*, [1983] 1 App. Cas. 719, 734–735 (P. C. 1982) (Lord Scarman, joined by Lord Brightman, dissenting). See generally *Harmelin* v. *Michigan*, 501 U. S. 957, 966–967 (1991) (SCALIA, J., concurring in judgment) (on the relevance of the 1689 Bill of Rights to the interpretation of our own Constitution).

Finally, a reasoned answer to the "delay" question could help to ease the practical anomaly created when foreign courts refuse to extradite capital defendants to America for fear of undue delay in execution. See *Soering* v. *United Kingdom*, 11 Eur. H. R. Rep. 439 (1989) (holding that the extradition of a capital defendant to America would be a violation of Article 3 of the European Convention on Human Rights, primarily because of the risk of delay before execution).

For these reasons, and for the additional reasons set forth by JUSTICE STEVENS in *Lackey*, *supra*, I would grant the petition for certiorari.